SUPREME COURT, U. S.

JUL 25 1974

MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

**October Term**

**No. 74-5**

EDWARD C. REA and 22 FORD, INC., a corporation,
*Petitioners,*

v.

FORD MOTOR COMPANY, a corporation,
*Respondent.*

## APPENDIX

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## United States Constitution Amendment VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

## United States Code, Title 15, Sections 1 and 2 (Sherman Act Sections 1 and 2)

§ 1. *Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty.*

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein in-

volved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

§ 2. *Monopolizing trade a misdemeanor; penalty*

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

UNITED STATES CODE, Title 15, Section 15
(Clayton Act, Section 4)

§ 15. *Suits by persons injured; amount of recovery*

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

## Automobile Dealers' Day in Court Act

§ 1221. *Definitions*

As used in this chapter—

(a) The term "automobile manufacturer" shall mean any person, partnership, corporation, association, or other form of business enterprise engaged in the manufacturing or assembling of passenger cars, trucks, or station wagons, including any person, partnership, or corporation which acts for and is under the control of such manufacturer or assembler in connection with the distribution of said automotive vehicles.

(b) The term "franchise" shall mean the written agreement or contract between any automobile manufacturer engaged in commerce and any automobile dealer which purports to fix the legal rights and liabilities of the parties to such agreement or contract.

(c) The term "automobile dealer" shall mean any person, partnership, corporation, association, or other form of business enterprise resident in the United States or in any Territory thereof or in the District of Columbia operating under the terms of a franchise and engaged in the sale or distribution of passenger cars, trucks, or station wagons.

(d) The term "commerce" shall mean commerce among the several States of the United States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or among the Territories or between any Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

(e) The term "good faith" shall mean the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each

other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: *Provided,* That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith. Aug. 8, 1956, c. 1038, § 1, 70 Stat. 1125.

§ 1222. *Authorization of suits against manufacturers; amount of recovery; defenses*

An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after August 8, 1956 to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: *Provided,* That in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in food faith. Aug. 8, 1956, c. 1038, § 2, 70 Stat. 1125.

§ 1223. *Limitations*

Any action brought pursuant to this chapter shall be forever barred unless commenced within three years after the cause of action shall have accrued. Aug. 8, 1956, c. 1038, § 3, 70 Stat. 1125.

§ 1224. *Antitrust laws as affected*

No provision of this chapter shall repeal, modify, or supersede, directly or indirectly, any provision of the anti-

trust laws of the United States. Aug. 8, 1956, c. 1038, § 4, 70 Stat. 1125.

§ 1225. *State laws as affected*

This chapter shall not invalidate any provision of the laws of any State except insofar as there is a direct conflict between an express provision of this chapter and an express provision of State law which can not be reconciled. Aug. 8, 1956, c. 1038, § 5, 70 Stat. 1126.

FEDERAL RULE OF CIVIL PROCEDURE 38(a)

Rule 38. JURY TRIAL OF RIGHT.

(a) RIGHT PRESERVED. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

**Opinion and Order**
**Defendant's Post-Trial Motions**

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

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EDWARD C. REA and 22 FORD INC.,
a corporation,

v.

FORD MOTOR COMPANY.

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Civil Action No. 67-286.

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KNOX, District Judge:

This complex and protracted piece of litigation has been pending since March 6, 1967, when plaintiffs, a Corporate Ford Dealer and its major stockholder, filed a complaint against defendant, Ford Motor Company, setting forth seven causes of action:

(1) Breach of contract as to purchase of real estate and erection of a dealership facility in Monroeville, Allegheny County, Pennsylvania.

(2) An action for specific performance to require conveyance of the property mentioned in the first cause of action.

(3) An action for violation of the Robinson-Patman Act, 15 U.S.C. 13(e).

(4) An action for violation of the Automobile Dealers Act, 15 U.S.C. 1221, *et seq.*

(5) An action based upon alleged monopolistic practices and restraints of trade under Sections 1 and 2 of the Sherman Act (15 U.S.C. 1 and 2).

(6) An action also based upon Sherman Sections 1 and 2, resulting from a requirement that plaintiffs not deal in vehicles, parts and equipment of a competitor of defendant, *viz.:* General Motors Corporation.

(7) An action for an order to the Prothonotary of Allegheny County to index a *lis pendens* during the pendency of the second cause of action for specific performance.

There ensued lengthy discovery proceedings and numerous motions and arguments with respect to these suits before two other judges of this court to whom the case was assigned before final assignment to the undersigned. There were also various proceedings in the United States District Court for the Eastern District of Michigan resulting from attempts by plaintiffs to take the depositions of Lee A. Iacocca, President of defendant, and other officials of the Ford Motor Company at its principal offices in Dearborn, Michigan, which proceedings as well as other discovery proceedings were vigorously resisted by the defendant.

After more than three years of discovery, defendant filed a motion for partial summary judgment with respect to the second and seventh causes of action and this court, by opinion and order dated May 5, 1971 (Rea v. Ford

Motor Co., 326 FS 627 (W.D.Pa 1971), granted this motion for partial summary judgment with respect to these causes of action holding there was no sufficient memorandum in writing to satisfy the Pennsylvania Statute of Frauds (33 Purdon's Pa. Stat 1) and also with respect to certain letters and other writings upon which plaintiff relied the authority of the person signing the same was not expressed in writing as also required by the Statute of Frauds. The Court of Appeals for the Third Circuit, by order dated September 15, 1972, dismissed an appeal from this order since, in the light of other developments in the case, it appeared that the appeal was improvidently certified. The court pointed out that subsequent to the lodging of the appeal, trial of the remainder of the case had been held at which plaintiffs (appellants) had pursued an alternative remedy, *viz.:* a claim for damages for breach of oral contract for the sale of real estate. Since post-trial motions were pending with respect to the jury's verdict hereinafter referred to awarding damages for breach of said oral contract, the appeal was dismissed with leave to the appellants to file a fresh appeal covering the subject matter in question, after the effective date of a final judgment in the District Court upon the remaining claims.

We adhere to our former decision on these matters reported in 326 FS 627 and hold that regardless of the finding of the jury that there was an oral contract for conveyance of real estate for breach of which damages were awarded, there is still insufficient evidence in writing of the existence and terms of such contract to justify an order of specific performance; that to allow specific performance under the second and seventh causes of action would be

prohibited by the Pennsylvania Statute of Frauds, *supra;* that there is insufficient evidence of a written memorandum with respect to said contract; and the authority of persons to sign certain documents and letters in behalf of Ford Motor Company was not expressed in writing as required by the statute. We will deal with the question as to whether there was sufficient evidence to go to the jury to justify their finding of an oral contract to convey real estate and their award of damages for breach thereof later in this opinion.

Meanwhile, the remainder of the case was proceeding to trial. The following issues were left:

(1) Breach of oral contract to convey real estate.

(2) Violation of the Robinson-Patman Act.

(3) Violation of the Automobile Dealers Act.

(4) Violation of Section 1 of the Sherman Act.

(5) Violation of Section 2 of the Sherman Act.

After further skirmishing with motions with respect to the pretrial narrative statements and motions for summary judgment and a lengthy pretrial conference, the case was fixed for trial in February of 1972. The trial was delayed by an attempt on the part of the plaintiffs to require the trial judge to disqualify himself which the trial judge refused to do. See Rea v. Ford Motor Co., 337 FS 950 (W.D.Pa 1972). The case proceeded to trial on April 17, 1972. The trial consumed five and one-half weeks, with over 5100 pages of transcript. At the conclusion of the evidence, the court directed a verdict as to Section 13(e)

of the Robinson-Patman Act (15 U.S.C. 13(e), holding (N.T. 5,008) that alleged discrimination as shown by plaintiff's evidence in favor of other dealers by offering them favorable real estate transactions and favorable terms of financing did not constitute a violation of theh Robinson-Patman Act which is concerned solely with price discrimination in the sale of commodities. See Gaylord Shops, Inc. v. Pittsburgh Miracle Mile Town & Country Shopping Center, Inc., 219 FS 40 (W.D. Pa 1963); Texas Gulf Sulphur Co. v. J.R. Simplot Co., 418 F.2d 793 (9th cir 1969); I.M. Skinner v. U.S. Steel Corp., 233 F 2d 762 (5th cir 1956).

The court likewise held that there was insufficient evidence of monopolization under Section 2 of the Sherman Act but permitted the case to go to the jury to determine if there was an attempt to monopolize under Section 2.

The jury was instructed by the court to return a special verdict which they did after lengthy deliberations, the material portions of which are set forth in Appendix I to this opinion.

The court thereupon entered judgments in accordance with the terms of the special verdict, trebling the damages found by the jury in answer to Question No. 9 in the amount of $1,750,000.00, pursuant to the provisions of 15 U.S.C. 15, whereby they were increased to $5,250,000 thus resulting in a total award against defendant of $5,629,683. The defendants have now filed post-trial motions as follows:

(1) Motion for Judgment in Accordance with Motions for Directed Verdict with respect to all causes of

action submitted to the jury (hereinafter referred to as Motion for Judgment *NOV*).

(2) In the Alternative, a Motion for New Trial alleging 35 reasons therefor.

(3) Motion to Amend the Judgment claiming that judgment had been entered in favor of the wrong persons.

We have received voluminous briefs from the parties (approximately 350 pages from the defendant and approximately 125 from the plaintiff) and have heard extensive oral arguments with respect to the same and will dispose of these motions in the following opinion.

In approaching this task, we bear in mind the elementary rule that a verdict winner is entitled to the benefit of all evidence in his favor regardless of who produced such evidence and all inferences deducible therefrom: Bruce Lincoln-Mercury v. Universal CIT Credit Corp.; 325 F 2d 2 (3d cir 1963); Globe Motors v. Studebaker-Packard Corp., 328 F 2d 645 (3d cir 1964); Walsh v. Miele v. Stein, 378 F 2d 409, (3d cir 1966); U.S. v. Evers, 448 F 2d 863 (3d cir 1971); Neville Chemical Co. v. Union Carbide, 422 F 2d 1205 (1970), (3d cir 1970).

We will deal with the motions with respect to each cause of action in the order in which they were presented.

(1) *Breach of Contract for Conveyance of Real Estate.*

Plaintiff's first cause of action alleges a contract to convey real estate generally known as the Balison tract in Monroeville, Allegheny County, Pennsylvania and asks for

damages for the breach of the same including loss of bargain. As previously discussed, partial summary judgment was entered for defendant with respect to the second and seventh causes of action seeking specific performance of this contract and *lis pendens*.

We adhere to what was said with respect to these matters in the opinion reported in Rea v. Ford Motor Co., 326 FS 627 (1971). Inasmuch as our Court of Appeals has held that the order previously entered was interlocutory and not subject to review and to protect plaintiff's rights we will again enter summary judgment in favor of defendant on the second and seventh causes of action. We now turn to questions now raised as to the first cause of action.

(a) The existence of an oral contract.

At the trial of this case, plaintiffs presented evidence as to the first cause of action and claimed damages for breach of an oral contract to convey real estate. This was proper under Pennsylvania law since the Statute of Frauds applies only to an action for specific performance and not to a suit for damages for breach of an oral contract respecting real estate. Polka v. May, 383 Pa 80, 118 A 2d 154 (1955); see also Thomson v. Sheplar, 72 Pa 160; McDowell v. Oyer, 21 Pa 417. In such case, however, the vendee's right to damages is restricted to monies laid out and expenses incurred on the faith of the oral contract to convey; he cannot secure damages for the loss of his bargain, *i.e.*, the difference between the contract price and the actual market price of the real estate or any loss of profits from the transaction or loss of any appreciation in value of the real estate.

Plaintiff Rea recognized this rule and submitted evidence as to his expenditures on the faith of the contract, *viz.:* $1.00 in option money which he says he paid to bind the bargain during negotiations plus expenses incurred by him in connection with the construction of the dealership facility on the property. During the course of construction, it was necessary to install hoists for servicing vehicles, conduits for electric cables and certain partitions. These were not in the original plans and the Ford Motor Company which paid the other costs of construction of the facility refused to pay for them and hence plaintiff paid the contractor for these items totalling $29,683. Payment was actually made by plaintiff Rea's controlled corporation, 22 Ford Inc., (as to which more hereafter) although it is clear that the original contract as found by the jury was between the individual plaintiff Rea and defendant Ford.

In our opinion at 326 FS 627 at 631, it was noted there had been a discussion between plaintiff Rea and the representatives of Ford Motor Company looking to Rea opening a Ford dealership at this new point for Ford sales in Monroeville. The discussions concerned a so-called direct-lease transaction whereby Rea or a corporation formed by him would acquire title to the land and then lease it under a long-term lease to Ford Motor Company whose payments of rents would be used to finance the transaction. Ford would then lease the facility back to the dealership. With Ford's name on the underlying lease which would be assigned to the financier, this would make a very desirable transaction. The evidence indicates that at some time this transaction was changed because the seller, which was a

corporation, wanted to sell stock and not assets, and Ford could not see any reason for paying financing charges to an outside party when it had ample resources to purchase this land and put up the buildings out of its own funds. The transaction was therefore modified so that Ford acquired the stock in the seller corporation and then dissolved this entity thus obtaining title to the real estate. At this time there were indications that Ford was willing to enter into some arrangement known as the "buy-out plan" whereby it would sell the property to Rea over a term of years. Some of the elements of this plan were embodied in the so called option which Ford sent to Rea on December 29, 1966, and which Rea refused to sign claiming it was not in accordance with the original understanding between the parties and that it gave him only an illusion of an interest in the property since Ford could reacquire it at any time at cost if Rea ever ceased to be a Ford dealer.

In our opinion at 326 FS 627 at 631, we indicated that all the documents showed was some evidence of negotiations looking eventually to working out an arrangement between Ford and plaintiff. When the case went to trial, we were not limited to written documents and communications but the entire nature of the understanding between Rea and Ford was introduced in evidence through the testimony of plaintiff Rea and his corroborating witnesses who were aware of the elements of the transaction. This evidence showed that in 1963 Rea, who was known as a highly successful Oldsmobile dealer in nearby Wilkinsburg, was approached as a dealer prospect by various representatives of Ford with a view to opening up a new Ford

dealership in Monroeville. Discussions were had not only with representatives from the Pittsburgh District Office of Ford but also representatives from defendant's general offices in Dearborn Michigan. A transaction was worked out according to plaintiffs' testimony whereby Rea was to enter into the so-called direct-lease deal for the Monroeville property. It appears that as part of the transaction in order to raise capital he at that time planned to give up his Oldsmobile franchise. It was stated to him that the transaction would be similar to that of the Rossi-Downtown Ford direct-lease in Detroit, the Chase-Morsey transaction for Paradise Ford in Scottsdale, Arizona, and other direct-lease dealer transactions which were mentioned in the testimony to show the manner in which the transaction was to be accomplished. The mortgage to the financier was to be amortized over a twenty-year period to cover the cost of land and improvements and the property then was to be sublet by Ford back to Rea's dealership. The rental factor was to be at the rate of 7½% of the cost of the land and facilities, plus amounts equal to taxes, insurance and maintenance. This would amortize the mortgage over a twenty-year period so that at the end of this time Rea would own the property free of encumbrances. Various communications in defendant's files confirmed that such a transaction was the plan.

The case was submitted to the jury to determine first whether there was any binding contract at all to which the jury answered "yes" and secondly whether the terms were those of the so-called direct-lease plan (Question 2(a)) or the so-called buy-out plan (Question 2(b)). The jury answered that the contract consisted of the so-called direct-

lease plan (Interrogatory 2a) and answered Interrogatory No. 3 that there had been a breach of contract by Ford and Interrogatory No. 4 awarded damages in the amount of $29,683 to plaintiff Rea.

There was ample evidence to support the jury's verdict with respect to the making of this contract notwithstanding defendant's contention that the evidence was too vague and indefinite to justify any finding for plaintiff.

It is true that the burden is upon the plaintiff to establish the terms of the contract on which he bases his claim: Kassab v. Ragner-Benson, Inc., 254 FS 830 (W.D.Pa. 1966). This was a non-jury case in which the judge held that the terms of an employment contract were too vague to be enforceable. The basic Pennsylvania case[1] is Beachler v. Mellon-Stuart Co., 354 Pa 341, 47 A 2d 147 (1946) which, like this case, was tried by a jury and the court held that there was insufficient evidence to support the jury's verdict that there was a binding and enforceable contract. The court held that there was no meeting of the minds as to any terms and the terms were most inadequate and indefinite and could not in any sense constitute a contract. In the instant case, the jury was carefully instructed on this and as to the necessity for finding a meeting of the minds. See Tr. 5070 *et seq.*

Beachler, *supra*, teaches us that in such a case to determine if there was sufficient evidence to go to the jury, we must look for the following:

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[1] Since the alleged contract was made in Pennsylvania and concerned Pennsylvania real estate, we apply Pennsylvania law to this portion of the case.

(1) Was there a meeting of the minds?

(2) When does the contract commence?

(3) For what period is it to run?

(4) What was the price to be paid?

(5) What were the terms of payment?

There is no question in a disputed issue as to whether a contract existed at all or where it is partly oral and partly written the case must go to the jury. Agger v. Frank Donatelli & Co., Inc., 171 Pa Super 631, 91 A 2d 303 (1952).

Applying the tests in Beachler to this case, we find that there was sufficient oral and written testimony to enable the jury to arrive at the conclusions which it did. There was evidence as to a meeting of the minds on the terms between Rea and the representatives of Ford Motor Company. The contract was to commence when the dealership facility to be erected on the land had been completed. It was to run for a period of twenty years. The amount to be paid was to be the total cost of the land and buildings which could easily be ascertained when the structure was completed. The terms of payment were an annual payment of 7½% of cost plus taxes, insurance and maintenance. Other details of the transaction were as set forth in the arrangements made with Rossi-Downtown Ford and Chase-Morsey Dealership in Scottsdale. This is a typical case for application of the maxim *id certum est quod certum reddi potest* (that is certain which can be made certain). When all the terms of a transaction have been agreed upon and all that remains is putting it in the form of a final formal writing, this will not prevent the Penn-

sylvania courts from treating it as an enforceable agreement and not mere negotiations. Mondy v. W. Va. Pulp & Paper Co., 385 Pa 39, 121 A 2d 881 (1956); Emerman v. Baldwin, 142 A 2d 440, 186 Pa Super 561 (1958).

The foregoing discussion also disposes of defendant's reason (aa) of its motion for new trial.

(b) The Parol Evidence Rule.

Defendant next claims that the parol evidence rule was violated by allowing testimony as to the existence of an oral contract and therefore the matter was improperly sent to the jury. The court at page 4881 refused to instruct on the parol evidence rule for the reason that there was nothing in the contracts with respect to purchase of the property. The two written instruments to which defendant is apparently referring as the basis for applying the parol evidence rule to this case are (1) the dealership agreement (plaintiff's exhibit 118) and (2) the lease agreement covering the facility (plaintiff's exhibit 65). Neither one of these agreements says anything about plaintiff's right to purchase the property. The dealership agreement is the standard Ford Dealer's agreement and has nothing whatsoever to do with the facility to be occupied by the dealer. The lease agreement is also a standard lease from Ford Motor Company to a dealer for certain facilities for a dealership and it likewise says nothing about the purchase of the premises by the dealer. As the court pointed out at page 4881, if the lease agreement, as many leases do, had an option to purchase clause in it, the plaintiff would be bound by it and we would not permit the in-

troduction of any parol testimony to vary its terms, but it does not.

While Pennsylvania is very strict in applying its parol evidence rule and has been since the landmark case of Gianni v. Russell and Co., 281 Pa 320, 126 A 791 (1924) nevertheless this rule only forbids oral testimony on a *subject covered by the contract.* As a matter of fact, Gianni says:

> "In cases of this kind, where the cause of action rests entirely on an alleged oral understanding *concerning a subject which is dealt with in a written contract,* it is presumed that the writing was intended to set forth the entire agreement as to that particular subject."

Further cases dealing with the subject hold that the question is whether or not a matter is dealt with at all in the writing. Bardwell v. Willis Co., 375 Pa 503, 100 A 2d 102 (1953); Grubb v. Rockey, 366 Pa 592, 79 A 2d 255 (1951); Tara Ann Inc. v. Sun Ray Drug Co., 383 Pa 521, 119 A 2d 91 (1956).

For these reasons, the court refused to apply the parol evidence rule and let the question of an oral contract go to the jury.

(c) Apparent Authority of Ford Representatives.

Defendant next contends that the Ford representatives who negotiated the transaction acted without authority, and seeks to rely upon certain evidence by Mr. Iacocca and others, that these representatives could only recommend

real estate transactions to the home office and had no authority to bind the company.

The negotiations with respect to the so-called direct-lease transaction, which was found by the jury to be a binding contract, were conducted largely by Mr. McClanathan, Pittsburgh District Sales Manager, and Mr. Chase, Market Representation Coordinator of Ford, who was sent out from the home office in connection with the transaction. Plaintiff offered the depositions of these persons and in these depositions were various statements indicating they did have authority to enter into the arrangement with Mr. Rea. It is elementary, of course, that an agent's judicial statements as to his authority are admissible to show the same, but not his extra-judicial hearsay statements.

The evidence indicates that Mr. McClanathan, District Sales Manager, was authorized and empowered to prospect for new Ford dealers and had conducted negotiations with Mr. Rea and that Mr. Chase was authorized by the market representation department to deal with Rea concerning the acquisition of a suitable site for the new dealership to be set up in Monroeville. The Ford General Sales Bulletin No. 5512 (Exhibit Px 82) set up authority of the market representation manager to enter into negotiations concerning dealership sites and Mr. Chase, Market Representative Coordinator, was sent to Pittsburgh for this purpose.

In addition to the above, we have the fact that certain letters from the Ford files which were offered in evidence by plaintiff indicated that Ford recognized it had made certain arrangements with Mr. Rea with respect to the facility in question and owed him some duty to honor them.

The court let the jury determine whether the plaintiff Rea was justified in relying on the apparent authority of the Ford representatives, this being a matter to be determined in deciding whether there was a valid contract (See Tr. 5065, 5066). The jury found against Ford on this score and it is the opinion of the court there was sufficient evidence for them so to find.

In view of the fact that the construction of an operation of this facility at this new point by Rea was intimately connected with his opening up the new Ford Dealership, negotiations for which were in charge of the Pittsburgh District Sales Manager, and in view of the fact that when matters reached a critical point, Mr. Chase, the Market Representation Coordinator, was specifically sent out from Dearborn to handle the transaction, would be enough for Mr. Rea to conclude that they had apparent authority to act. It would not be appropriate for him to meet Mr. Chase at the airport and demand that he produce a resolution from the Ford Motor Company Board of Directors before he discussed the matter further with him.

The court concludes that under Pennsylvania law Mr. Rea was entitled to rely on this apparent authority despite the alleged secret restrictions which Ford claimed it had imposed upon these agents. See Revere Press, Inc. v. Blumberg, 431 Pa 370, 246 A 2d 407. See also Restatement of Agency 2d, Sections 8, 27 and 50.[2]

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[2] "Sec. 8. Apparent Authority. Apparent authority is the power to affect the legal relations of another person by transactions with the third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons."

(Footnote continued on following page)

Our Court of Appeals has recently discussed apparent authority in Reading Co. v. Dredge Delaware Valley, (3d cir slip opinion, October 25, 1972, No. 71-1853), as follows:

> "Apparent authority is the power to bind the principal where the principal has not actually granted authority but which he leads persons with whom his agent deals to believe that he has granted. Persons with whom the agent deals can reasonably believe that the agent has power to bind his principal if the principal knowingly permits the agent to exercise such power: Revere Press, Inc. v. Blumberg, 431 Pa 370, 246 A 2d 407 (1968)."
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> "It is sufficient to create apparent authority if the principal should realize that his conduct is likely to create a belief that the agent is authorized to act for him. Restatement of Agency, 2d, Section 27. Comment a, p. 104. See Revere Press, Inc. v. Blumberg, et al, 431 Pa 370 (1968)."

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(Footnote continued from preceding page)

"Sec. 27. Creation of Apparent Authority: General Rule. Except for the execution of instruments under seal or for the conduct of transactions required by statute to be authorized in a particular way, apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him."

"Sec. 50. When Authority to Contract Inferred. Unless otherwise agreed, authority to make a contract is inferred from authority to conduct a transaction, if the making of such a contract is incidental to the transaction, usually accompanies such a transaction, or is reasonably necessary to accomplish it."

There is no evidence that Mr. Rea was aware of any limitations on the authority of the Ford representatives if they existed. For this reason, we hold that the question of apparent authority was for the jury to decide.

(d) Damages—Expenditures by 22 Ford, Inc.

The contract with respect to the real estate was originally entered into between the individual plaintiff, Edward C. Rea, and the Ford Motor Company. The land was to have been bought and the facility constructed by Rea and then leased to Ford Motor Company and subleased back to the Dealership to be formed by Rea which is now 22 Ford, Inc. one of the two plaintiffs in this case. As previously noted, under Pennsylvania law, the purchaser under an oral contract for sale of real estate can recover any such expenditures made by him upon the faith of the contract. Therefore, the jury was told that Rea was entitled to recover any such expenditures made by him if they found the contract existed (Tr. 2154) but was further told they could not include expenditures for movable personal property and equipment which a tenant would remove at the end of the lease.

Defendant claims that plaintiff should not be allowed to recover anything for breach of this oral contract for the reason that all expenditures appear to have been made out of the funds of 22 Ford, Inc. and not those of plaintiff Rea. The evidence shows that Rea was the owner of 91.3% of the capital stock of 22 Ford, Inc. (See plaintiff's Exhibit 118) and, of course, had overwhelming control of the same.

While the facility was being constructed, it appeared that electrical conduits had to be installed in the ground and that hoists also had to be installed for servicing cars. These items were not included in the construction price and this installation was very costly because the mechanism had to be installed in solid rock. In order to get the facility operating and, as believed by the jury, in reliance upon Ford commitments that eventually he would own the facility, Rea authorized the contractor to go ahead and make the installations and agreed to pay for them out of his own pocket. Instead of paying for them himself, however, he took the funds to pay the contractor out of the assets of 22 Ford, Inc. which he controlled.

It is the opinion of the court that it does not lie in the defendant's mouth to criticize or raise a question as to where Rea got the funds to which he had committed himself for payment to the contractor. The invoices showing payment of these amounts by 22 Ford, Inc. were introduced without objection by the defendant (plaintiff's Exhibit 11). Rea could have borrowed the money from a bank and had the bank pay the contractor out of a construction fund and the defendant could not raise any question about Rea's right to recover. We do not know what the arrangements between Rea and 22 Ford, Inc. are for repayment of these amounts. They may be considered loans to Rea by the corporation or dividends to him or he may be trustee of these amounts to repay them to 22 Ford, Inc. in the event of recovery. In any event, we do not see that this is any concern of the defendant or in any wise militates against Rea's recovery.

Defendant also asserts that Rea is not the real party in interest with respect to this claim and therefore would not be entitled to any judgment. There are two answers to this argument:

(1) Failure to timely object constitutes a waiver of that defense. See McLouth Steel Corp. v. Mesta Machine Corp., 116 FS 689 (E.D.Pa. 1953) *aff'd* 214 F 2d 608 (3d cir 1954) cert. den. 348 US 873, 99 L ed 87, 75 S Ct 109 (1954).

(2) Rule 17(b) of the Federal Rules of Civil Procedure states: "The capacity of an individual to sue or to be sued shall be determined by the law of his domicile" in this case, Pennsylvania. Pennsylvania law is clear that a plaintiff may sue in his own name without joining as plaintiff any person beneficially interested, when such plaintiff is acting in a fiduciary or representative capacity, or is a person with whom or in whose name a contract has been made for the benefit of another. See Pennsylvania Rules of Civil Procedure, Section 2002.

Defendant also argues that these items were trade fixtures which could be removed by the tenant at the end of the lease. The court admonished the jury that Rea was not entitled to recover for any movable equipment but only what he had contributed by way of permanent installation. The hoists and electrical conduits obviously could not, as a practical matter, be removed without seriously damaging the same and the building in which they were installed. For all practical purposes, the monies for these items represented contribution to the permanent overall cost of the building and since Rea is not getting the building, he is entitled to recover these items from the defendant.

The above discussion covers the grounds for new trial pertaining to this cause of action. The motions for Judgment *NOV* or new trial as to this cause of action will be denied.

(II) *Automobile Dealers Franchise Act.*

The jury has found that defendant Ford breached its duty to act in good faith in performance or in complying with the terms of the franchise or sales agreement between 22 Ford, Inc. and Ford Motor Company as required by the Automobile Dealers Act sometimes known as the Automobile Dealers Franchise Act or the Automobile Dealers Day in Court Act (15 U.S.C. 1221, *et seq*). The jury awarded $350,000 damages for this breach of duty.

The relevant sections of this statute are set out in Appendix II hereto.

The complaint in this case, filed March 6, 1967, sets forth under the first cause of action in paragraph 5 that defendant knew that plaintiff was operating a successful Oldsmobile Dealership known as Rea Oldsmobile, Inc., under the General Motors Franchise in Wilkinsburg and in paragraph 8, it was averred that plaintiff was required to give up the General Motors Franchise in order to take over the Ford Dealership and that plaintiff did terminate his Oldsmobile Dealership. In the fourth cause of action, paragraph 35, it is averred that defendant failed to act in good faith in performing or complying with the terms of its franchise agreement with plaintiff and threatened and coerced and intimidated him to enter into a lease agreement and that the defendant's bad faith was further evi-

denced by failure to formalize the agreement to convey the dealership property to Rea and in paragraph 37, it is averred that these actions of the defendant were in violation of the Automobile Dealers Act, *supra*. Again, in the sixth cause of action, under the antitrust laws, it was alleged that defendant required plaintiff not to use or deal in the motor vehicles, parts and equipment of General Motors Corporation. This was alleged to be in violation of Section 3 of the Clayton Act and of the Sherman Act. It will be observed that under Section 4 of the Automobile Dealers Act, 15 U.S.C. 1224, it is provided that this Act shall not repeal, modify or supersede directly or indirectly any provision of the antitrust laws and it has been held that it was intended to supplement the antitrust laws as a part of the antitrust program of the government. Schnabel v. Volkswagen of America, Inc., 185 FS 122 (N.D. Iowa 1960).

The court instructed the jury that under the Automobile Dealers Act, plaintiffs could not recover for lack of good faith with respect to the failure of Ford to carry out the terms of the alleged contract for conveyance of real estate nor could plaintiffs recover for being required by alleged threats and intimidation to enter into the lease agreement for the use of the facility by the dealership because the Act in question covers only the written agreements contained in the dealership franchise agreement and nothing was said therein (Plaintiff's Exhibit 118) relative to lease of any facilities or any undertaking to convey real estate to the plaintiffs. The court did, however, instruct the jury that they could find a cause of action under the Automobile Dealers Act if they found that the defendant, by coercion,

threats and intimidation, had required plaintiff to give up the Oldsmobile Franchise with General Motors because it was specified in the franchise agreement that nothing was to be construed to prevent the dealer from dealing in the products of other manufacturers (see Tr 5079, 5083, 5087, 5122 and 5124, Paragraph 3 of Standard Provisions, Plaintiff's Exhibit 118).

There was ample evidence from which the jury could have found such coercion and intimidation as would justify a conclusion that this act was violated. The testimony is to the effect that Mr. Rea had indicated to Ford originally that he intended, if he took over the Ford agency, to sell his Oldsmobile Dealership so as to raise capital to open up the Ford Dealership. Notwithstanding the fact that the franchise agreement (Plaintiff's Exhibit 118) clearly provided that the dealer had the right to make purchases from others, he testified that when he was ready to go into the new facility he asked the Ford District Sales Manager what would happen if he decided to keep his Oldsmobile Dealership and he was told that he had to give it up in order to continue as a Ford Dealer. He apparently thought at that time that he would be able to get sufficient capital without selling the Oldsmobile Dealership and he protested that there was nothing in the Ford Franchise Agreement which required him to give up the Oldsmobile agency. He was then told: "Well, that may be so, but the Ford Sales Agreement doesn't ship cars and the Ford District Office does and if you don't get rid of Oldsmobile, you won't get a new Ford in that new building" (Tr. 145-148). He was also told, "We are selling you these Fords on condition that you are not going to sell Oldsmobiles

when the new building is ready" (Tr. 149) and again, "If you don't get rid of your Oldsmobile Franchise, you won't get a Ford in that new building" (Tr. 835). One can hardly imagine a more devastating threat or intimidation of an automobile dealer than to have the manufacturer tell him that it would not give him any cars to sell unless he complied with illegal requirements contrary to the terms of the dealership franchise.

It will be observed that we do not have here a dealership franchise cancellation case as are most of the cases arising under this Act. Instead, we have a case involving failure to perform the contract in good faith.

One of the leading cases with respect to the application of this Act is Milos v. Ford Motor Co., 317 F 2d 712 (3d cir 1963), cert. den. 84 S. Ct. 172, 375 US 896, 11 L ed 2d 125 (1963). This was a termination case in which the court determined that enforcement of contractual obligations with reference to assignment of market potential was not coercion and indicated that the first question is whether the contract itself is coercive as written and, secondly, whether it was administered by the manufacturer in bad faith. In the instant case, we determine that the contract was not coercive as originally written but the jury had ample justification for determining that it was administered with bad faith and coercion.

In Buono Sales, Inc. v. Chrysler Motor Corp., 449 F 2d 715 (3d cir 1971), a suit for discontinuing the production of the DeSoto Automobile, it was held that there was a violation of the dealership contract but no violation of the Automobile Dealers Act. The Court said that to sue-

ceed for violation of this Act, the dealer must show bad faith which requires evidence of coercion, intimidation or threats. It was held that termination alone would not be a violation of the statute but rather it must have been used as a threat in an attempt to force the dealer to do certain things. The court said: "These examples indicate that Congress was really trying to reach borderline antitrust violations. In fact, the purpose of the act was to 'supplement the antitrust laws.' ". The court further said, "Furthermore, there was no 'wrongful demand which will result in sanctions if not complied with.' " In the instant case, there was a wrongful demand as found by the jury which was to result in severe sanctions if not complied with.

Again, in Berry Brothers Buick, Inc. v. General Motors Corp., 257 FS 542 (E.D.Pa. 1966), referred to with approval in Buono Sales Inc., *supra,* there was another termination case affirmed 377 F 2d 522 (3d cir 1967). It was held that the test of a cause of action under this Act is lack of good faith in connection with threats and coercion. There must be a wrongful demand. An unreasonable demand to accept cars or parts the dealer does not want "or else" might qualify as a cause of action but, in that particular case, it was held that there were no facts to show the manufacturer did not act in good faith.

Again, in Garvin v. American Motor Sales Corp., 318 F 2d 518 (3d cir 1963), another termination case, it was held that to show bad faith, you must show coercion and the court pointed out that the legislative history showed that the manufacturer may appoint additional dealers unless the appointment is used for coercion and intimidation.

In Globe Motors, Inc. v. Studebaker Packard Corp., 328 F 2d 645 (3d cir 1964), the court held that there was insufficient evidence to support a jury's determination that the manufacturer failed to act in good faith and the court reiterated the rule that the term "lack of good faith" was confined to the context of coercion and intimidation and it was held that plaintiff had failed to show that the manufacturer had discriminated against him and in favor of a competitor in the allocation of automobiles. It was further held that the dealers franchise agreement was an integrated contract and not subject to variation by parol evidence. Further in RAC Motors, Inc. v. Worldwide Volkswagen Corp., 314 FS 681 (D.C.N.J. 1970), it was held that the Automobile Dealers Act created a new cause of action, that the test was not lack of good faith in the ordinary sense but lack of good faith in which coercion, intimidation and threats are implicit.

The present case where there were threats and coercion fits more readily into American Motor Sales, Inc. v. Semke, 384 F 2d 192 (10th cir 1967). Here a verdict for the plaintiff was sustained where the manufacturer refused to supply its franchised dealer with automobiles unless he ordered unwanted models and the court said, "Such action by a manufacturer comes clearly within the statute as is reflected by the legislative history of the act mentioned above and thus amounts to coercive or intimidative acts and is sufficient to support a finding of 'lack of good faith' ". There was also evidence that the manufacturer refused to honor its warranties.

As previously pointed out, the complaint in this case clearly alleged the requirement that plaintiff get rid of his Oldsmobile or General Motors Dealership as a violation

of Section 3 of the Clayton Act (15 U.S.C. 14).[3] Since there was a factual question as to whether the effect of the demand on Rea requiring him to give up his Oldsmobile Dealership and thus not use or deal in the goods of a competitor of Ford Motor Company did lessen competition, this question under Section 3 of the Clayton Act was submitted to the jury (Tr. 5085, 5086, 5113, 5114). The court, however, did comment that it would not appear that the effect of this transaction was substantially to lessen competition or tend to create a monopoly in any line of commerce for the reason that it appeared that when Rea got rid of his Oldsmobile Dealership, it was to another dealer who immediately continued the business and was still in operation and thus there was no change in the competitive position of General Motors, vis-a-vis Ford. The court was concerned particularly that the jury might find a violation of Section 3 of the Clayton Act and award damages including this item in the general award of damages for violation of the other antitrust laws thus resulting in a

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[3] "*Sale, etc., on agreement not to use goods of competitor.* It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, *where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.* Oct. 15, 1914, c. 323, Sec. 3, 38 Stat. 731."

recovery duplicating that under the Automobile Dealers Act. The jury's special verdict shows, however, the intelligence and discrimination with which the jury approached these issues because in answer to question 8, as to whether the defendant had violated Section 3 of the Clayton Act, by forbidding Rea to deal in goods and commodities of a competitor, *viz.:* Oldsmobile automobiles, where the effect was substantially lesser competition or create a monopoly, they answered: "No". It is thus clear that the jury did not consider this conduct as violating the other antitrust laws but did specifically find a violation of the Automobile Dealers Act.

We find nothing inconsistent with respect to these findings of the jury. As pointed out in the court's charge, a violation of Section 3 of the Clayton Act was at best questionable under the evidence in this case and the jury merely viewed this in the same light as the court. On the other hand, the jury clearly found under other instructions of the court that there was coercion and intimidation in violation of the Automobile Dealers Act and awarded damages accordingly. In the Title to the Automobile Dealers Act as quoted by our Court of Appeals in Bateman v. Ford Motor Co., 302 F 2d 63 (3d cir 1962) the purpose was stated to "*supplement* the antitrust laws in the United States in order to balance the power now heavily weighted in favor of the automobile manufacturers – – –". Thus, Congress clearly envisaged that certain conduct by a manufacturer might not rise to the heights of an antitrust violation but nevertheless constitute such inequity as demanded a remedy and that is what the jury determined in this act.

Notwithstanding the above, defendant raises various objections to the jury's verdict under the Automobile Dealers Act:

(a) It is claimed that the allegations supporting this cause of action were not contained in the complaint or in plaintiff's pretrial narrative statement. We have previously pointed out the allegations pertaining to demands that he cancel his General Motors Franchise were contained in the sixth cause of action in the complaint in which he claimed violation of Section 3 of the Clayton Act and also the Sherman Act and in the fourth cause of action alleging violation of the Automobile Dealers Act, it was alleged that the defendant failed to act in good faith in performing or complying with the terms or provisions of its franchise agreement by deceiving and threatening plaintiff with respect to the lease agreement.

In the pretrial narrative statement, at page 16, a claim was made for damages from losses sustained by Rea Oldsmobile, Inc. (a predecessor as will be discussed later) resulting from the requirement that the Oldsmobile contract be terminated and that plaintiffs would not sell other products. At page 22, in the claim for damages, a claim was made for loss of estimated gain and net worth by Rea Oldsmobile of $400,000. At pages 45 and 46, claims were set forth under the Automobile Dealers Franchise Act as the result of the failure of the manufacturer in good faith to comply with the franchise agreement.

"The fact that plaintiff has postulated a faulty theory in support of the claim does not justify dismissal if there are grounds for relief on another theory." Garga v. Chicago Health Clubs, Inc., 347 FS 955 (N.D.Ill. 1972).

It thus appears that defendant was well informed that plaintiff was basing a claim upon the requirement that he cancel his Oldsmobile Franchise. We are taught that pleadings in antitrust actions are to be given a liberal interpretation. See Travis v. Fairmount Foods Co., 346 FS 679 (E.D.Pa. 1972); Conley v. Gibson, 355 US 41, 2 L ed 2d 80, 78 S Ct 99 (1957); Exhibitors Poster Exchange, Inc. v. National Screen Service Corp., 421 F 2d 1313 (5th cir 1970). In view of the fact that defendant had ample notice and warning that plaintiff was relying upon the enforced cancellation of its Oldsmobile Franchise as part of its causes of action, it is our opinion that it was in the power of the court to prevent manifest injustice to allow this issue to go to the jury and that this was not an abuse of discretion. See Moore v. Sylvania Electric Products, Inc., 454 F 2d 81 (3d cir 1972). See also Sherman v. U. S., 462 F 2d 577 (5th cir 1972) where the court said:

> "The trial judge is vested with broad discretion to preserve the integrity and purpose of a pretrial order. Basically, these orders and stipulations, freely and fairly entered into, are not to be set aside except to avoid manifest injustice. FRCP 16. However, in the interest of justice and sound judicial administration, an amendment of a pretrial order should be permitted where no substantial injury will be occasioned to the opposing party, the refusal to allow the amendment might result in injustice to the movant, and the inconvenience to the court is slight. See Central Distributors, Inc. v. M. E. T., Inc., 5 Cir 1968, 403 F 2d 934, 946; Henry v. Commissioner of Internal Revenue, 5 Cir 1966, 362 F 2d 640, 643; Laird v. Air Carrier Engine Service, Inc., 5 Cir. 1959, 263 F 2d 948."

See also Rule 16 of the Federal Rules of Civil Procedure. If defendant had not been well aware that plaintiff was relying in part on the enforced cancellation of its Oldsmobile Franchise our decision would be otherwise.

(b) *The Statute of Limitations.*

As noted above, the Automobile Dealers Act in Section 3 (15 U.S.C. 1223) provides a three-year statute of limitations "after the cause of action shall have accrued". The complaint was filed March 6, 1967. The Oldsmobile Franchise was cancelled by plaintiff on August 31, 1964, well within the three-year period. This cancellation was the result of threats of Ford representatives made during the period March 1, 1964 to August 31, 1964 (Tr. 144-148). We hold the cause of action did not accrue until the cancellation on August 31, 1964, well within the three-year period.

(c) *Failure to Submit Dispute to Dealer's Policy Board.*

We have examined plaintiff's Exhibit 118, paragraph 2(g) of Standard Provisions upon which defendant relies and can find therein no clear requirement that plaintiff had to submit disputes arising out of threats and coercions to stop delivery of cars to him to the Dealers Policy Board as a prerequisite to bringing suit in court for violation of the Automobile Dealers Act and it is questionable whether such a clause could oust the court of jurisdiction to entertain the suit under the Act, particularly when the matter complained of is tied in with threats and coercion and intimidation. This is not a clause that requires submission of disputes to arbitration as a condition precedent to bringing action in court. We therefore do not reach the question

of whether submission of the issues to such a Board apparently dominated by the company executive committee would be a vain thing under the circumstances.

We have considered Bateman c. Ford Motor Co., 302 F 2d 63 (3d cir 1962) and the district opinion on remand Bateman v. Ford Motor Co., 214 FS 222 (E.D.Pa. 1963) in which there was dicta to the effect that the dealer breached his contract by not reporting acts of coercion to the Dealer Policy Board. But there the court also found there was no coercion, intimidation or lack of good faith on the defendant's part. It appears that the clause in question (2 g) in Bateman, as here, did not require submitting claims of coercion and so forth to the Policy Board as a requirement for bringing suit or specify any penalty for failure to bring the matter to the Board.

(d) *Claim Made by Wrong Party.*

The jury in this case very properly awarded the damages for violation of the duty owed under the Automobile Dealers Act to 22 Ford, Inc., the authorized Ford Dealer. Defendant now claims that if there was any cause of action for violation of the Automobile Dealers Act, the same belonged to a separate entity *viz.:* Edward C. Rea, Inc. d/b/a 22 Ford Sales, Inc.

The original franchise agreement had been awarded to Edward C. Rea, Inc. d/b/a Ford Sales, Inc. on February 11, 1964 (plaintiff's Exhibit 118). This agreement was later, on March 9, 1966, assigned to 22 Ford, Inc., the corporate plaintiff in this lawsuit. This assignment was accepted and consented to by the defendant on April 21, 1966, and defendant Ford also consented to the change

of name of the dealer to 22 Ford, Inc. It is clearly indicated that plaintiff, Edward C. Rea, the individual plaintiff, owned 91.3% of the capital stock of 22 Ford, Inc. The original threats were made personally to Edward C. Rea, a person in control of both corporations. Under the Automobile Dealers Act, only the dealer can bring suit. The threats made to Mr. Rea in March through August, 1964, obviously referred to what would happen to the corporate dealer if Rea did not get rid of his Oldsmobile Dealership and these threats gave rise to a cause of action under the Automobile Dealers Act. This cause of action was included in the transfer of rights under the dealership agreement to 22 Ford, Inc. in April 1966 and thus 22 Ford, Inc. as a successor to Edward C. Rea, Inc.'s rights under the franchise was entitled to bring suit and recover damages resulting from those threats.

(e) *Damages Excessive or Conjectural.*

The damages allowed by the jury in the amount of $350,000 were amply sustained by the testimony of the expert Dr. Staelin and the exhibits prepared by him (plaintiff's Exhibits 242(a), (b) and (c)). He projected the profits which would have been obtained had the Oldsmobile Dealership been continued and came up with two figures either one of which he testified was proper, one of $559,000 and the other of $690,000. These figures were based upon profits before taxes and bonuses. The jury very properly concluded that other factors should be considered and allowed only $350,000 which again demonstrates the discriminating care with which the jury approached this case. It will be noted that Dr. Staelin only projected

the lost profits to the date of trial and did not allow anything for the future which might have been too speculative to consider. See Volasco Products Co. v. Lloyd Fry Roofing Co., 308 F 2d 383 (6th cir 1962). The jury was told at Tr. 5087 that the validity of Dr. Staelin's testimony was for them to determine, that they could adopt or reject it in whole or in part.

(f) *Trial Errors.*

Defendant complains of certain trial errors as to this cause of action:

(1) It is claimed the court erred in instructing the jury as to the purpose of the Automobile Dealers Act in mentioning the large economic power of the manufacturer versus that of a single dealer (See Tr. 5077-5083). It should be sufficient answer to this that there does not appear to have been any exception taken to this. Regardless of this, all the court really did was explain to the jury the purpose of the act as set forth by the Court of Appeals in Milos v. Ford Motor Co., *supra,* and tell them that the question as to the wisdom of this legislation was a matter for Congress to decide. We see no error here. This is paragraph 23(b) of the Motion for New Trial or Judgment *NOV.*

(2) In reason 23(q) of the Motion for New Trial, defendant complains of the court's charge with respect to coercion and intimidation by Ford representatives as being a violation of the Automobile Dealers Act. This has been fully covered in the foregoing discussion in this section of the opinion and merits no further mention here.

(3) Reason 23(a) of the Motion for New Trial complains of the court's remark to the jury that they could find that Rea had changed his mind about selling his Oldsmobile Dealership (Tr. 5086). This is in accordance with Rea's testimony at Tr. 831-835 where he stated that he had inquired what would happen if he decided not to sell his Oldsmobile Dealership and was told he would get no more cars.

The Motions for Judgment *NOV* or new trial with respect to the cause of action based upon violation of the Automobile Dealers Act will be denied.

(III) *Sherman Act, Section 1.*

With respect to the antitrust laws, plaintiffs' first claim is that there was a violation of the Sherman Act, Section 1.[4]

For this plaintiffs claim they are entitled to recover damages under Section 4 of the Clayton Act (15 U.S.C. 15).[5]

Since there is no evidence of any contract in restraint of trade, we must turn our attention to the question of whether the evidence shows a combination or conspiracy

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[4] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal . . ."

[5] "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, Sec. 4, 38 Stat. 731."

in restraint of trade or commerce among the several states or with foreign nations and whether this has resulted in damage to the business or property of the plaintiffs. The jury so found in answering questions 6 and 7 in the affirmative and answered a question as to Section 3 of the Clayton Act (question 8) in the negative and the found plaintiffs' damages were $1,750,000.

There seems to be no dispute that both defendant and the plaintiffs were engaged in interstate commerce. The vehicles which plaintiffs sold came from assembly plants in other states and Canada. Plaintiffs' sales were made not only in the Pittsburgh, Pennsylvania area but also to persons in other states.

It is elementary of course that a defendant such as Ford Motor Company cannot conspire with itself or combine with itself to restrain trade. However, it has also been held that a parent corporation such as Ford Motor Company here can conspire with its wholly owned subsidiaries. Perma Life Mufflers v. International Parts, 392 U.S. 134, 20 L ed 2d 982, 88 S Ct 1981 (1968). See also Kiefer Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 US 212, 95 L ed 219, 71 S Ct 259 (1950). In this case there is evidence that the defendant conspired or combined with its wholly owned factory stores and dealer development stores which the evidence shows were separate corporations. The prime target of plaintiffs' evidence in this case is the operation of the store on Baum Boulevard in Pittsburgh, Pennsylvania known as Triangle Ford which it appears was a wholly owned factory store. There were also others at various times in the Pittsburgh area. The evidence shows that

not only Ford Dealers but also Lincoln-Mercury Dealers compete with each other and with Ford Dealers.

In this connection, the defendant claims that the court erred in referring to Ford Marketing Corporation as a possible subsidiary with whom the defendant could conconspire or combine in restraint of trade. See reason for new trial 23(d). The claim is made that Ford Marketing Corporation was not incorporated until 1970 and that most of the injury and damage had occurred before this date.

A close examination of the court's charge on this subject which is found at page 5100, *et seq*, where there was discussion relative to a corporation conspiring with itself or with its subsidiaries will show that the Ford Marketing Corporation was used merely as an illustration of how a manufacturer could conspire with its subsidiaries. If the court misunderstood the evidence as to the date the Ford Marketing Corporation entered the picture, this could have easily been corrected had the court's attention been called to it, but the record shows there was no exception taken to this part of the charge. See page 5126. See Federal Rule of Civil Procedure 51, Morley v. Branca, 456 F 2d 1252 (3d cir 1972).

It is elementary that the existence of a combination or a conspiracy may be shown by circumstantial evidence and may be inferred from the circumstances of the case. Ordinarily, in the case of a conspiracy, the fact of the conspiracy is seldom capable of proof by direct testimony and is inferred from the things actually done. This is particularly true of that portion of the Sherman 1 case here which pertains to the fleet sales to Hertz and Avis and

other national car leasing companies. American Tobacco Co. v. U.S., 328 US 809 (1945); Flintco Co. v. Lysfjord, 246 F 2d 386 (9th cir 1957). Kiefer Stewart v. Seagrams, *supra*. In U.S. v. General Motors Corp., 384 US 127, 16 L ed 2d 415, 86 S Ct 1321 (1965), the court stated:

> "It has long been settled that explicit agreement is not a necessary part of a Sherman Act conspiracy . . . ."

It further stated:

> ". . .nor do we propose to construe the Sherman Act to prohibit conspiracies to fix prices at which competitors may sell but to allow conspiracies or combinations to put competitors out of business entirely."

In the instant case, Ford Motor Company, by operating factory stores and dealer development stores which were under its domination, was in competition with its own dealers. Therefore, when it adopted a course of action in combination with such stores to drive any of these independent dealers out of business or to dominate the market, it was certainly engaged in combination or conspiracy or restraint of trade under the Sherman Act. See U.S. v. McKesson & Robbins, Inc., 351 US 305, 100 L ed 1209, 76 S Ct 937 (1956). We have no doubt that there is nothing inherently evil in a dual distribution system whereby a manufacturer may sell its own products to the customers directly through company outlets along side independent dealers. See the remarks by the Antitrust Division of the United States Department of Justice Hearings before the Select Committee on Small Business of the United States Senate

Judiciary Committee (1963) quoted at page 58 of plaintiffs' post-trial brief. When, however, the manufacturer who as in this case is a member of an oligopoly[6] secretly sets up factory stores and so-called dealer development stores for the avowed purpose of dominating the market in certain metropolitan centers regardless of the consequences to the independent dealers or for the avowed purpose of driving them out of business, then a violation of the antitrust laws occurs. Ford, the second largest manufacturer of automobiles in the United States, is the only source of Ford Motor vehicles, and if it chooses to dominate a local market through the operation of factory stores and dealer development stores, it is certainly in a position to do so.

The record in this case contains evidence which, if believed by the jury, as it obviously was, shows a predatory intent on the part of the defendant to dominate certain metropolitan markets to the damage of its independent distributors such as the plaintiff herein. We do not in this case have to rely upon inferences from circumstantial evidence to determine Ford's intent. Here, in contrast to many other cases, we have actual undenied evidence of such purpose.

Witness Schroll testified to certain statements made by executives of the Ford Motor Company which clearly

[6] An oligopoly is defined (Tr. 4531) as a market situation where a very few producers control the market. The testimony is that in the automobile field, General Motors has 40% of the market, Ford has 25%, Chrysler 18%, American Motors a very small percentage and foreign car manufacturers have risen from a small percentage to approximately 15%.

showed this intent (See Tr. pp. 1340-1346). For instance, George Callas, Dealer Development Executive, was quoted as announcing a plan to place factory stores in the major metropolitan marketing areas of the United States "to get dominance in those markets" even though the effect would be to drive the independent dealers out of these marketing areas. It was stated there were twenty major metropolitan marketing areas in the country which were the target of Ford's plan and Pittsburgh was listed as one of them. At a meeting in which several Ford Executives were present including the national sales manager, the view was expressed "We don't care about the dealers. We are going to operate the factory stores. If they don't like it, the hell with them." This evidence was clinched by a statement attributed to Mr. Iacocca, then head of the Ford Division, now President of the whole Ford Motor Company, at a meeting in New York where he stated that the company intended to operate factory stores and if necessary were going to get more factory stores and they were going to acquire dominance in the twenty major marketing areas in the United States and if the dealers didn't like it, in effect "to hell with you". Despite the fact this testimony appeared early in this trial which took five and one half weeks, Mr. Iacocca never appeared in court to deny making these statements. This naturally would weigh heavily with the jury.

It is obvious what the motives of Ford Motor Company were. They saw that certain dealers were making considerable profits from the sale of Ford vehicles. The company itself was making a profit of between $300 and $600 on each car manufactured and if they embarked on

a program "to get the numbers out" (Schroll Tr. 1062) they could easily afford to infuse large amounts of capital into the factory stores and suffer losses in the operation of the stores but still make an overall profit on the manufacture of the cars. It was pointed out that consolidated income tax returns were filed whereby losses in the operation of company store subsidiaries could be offset against the profits of the manufacturing operation (See Schroll 1236, 1523).

The above discussion also deals with reasons 23(h), 23(l) and 23(v) of defendant's reasons for new trial dealing with the statements by Iacocca, Barclay and Callas. Defendant claims that there was a misquotation of these statements. However, we have examined this and cannot see any substantial misquotation. In any event, the jury was cautioned that it was their memory of the testimony and not the court's which controlled (Tr. 5073). With respect to the claims that the jury was not told that Schroll's statements were denied by Ford officials, this was dealt with at Tr. 5104 where the jury was told to consider the statements of Ford officials in this connection. Defendant also complains in reason 23(i) that the jury was told to consider Schroll's present activities. This actually was prejudicial to plaintiff since it called attention to the fact that Schroll was engaged in attempts to prosecute claims against Ford Motor Company which would show a motive on his part for his testimony. The court holds that all these reasons are without merit.

This brings us to the two main elements upon which plaintiffs rely with respect to their action for violation of

the antitrust laws. These are: (1) operation of factory stores or dealer development stores in the area and (2) fleet sales to Hertz and Avis fleet leasing companies.

(1) Operation of Factory Stores.

Much of what is said under this heading is also applicable to the attempt to monopolize by Ford under Sherman Act, Section 2. It has been held that the same evidence of a conspiracy which is applicable to Sherman, Section 1 may also be applicable to Sherman, Section 2. Industrial Building Materials Inc. v. Interchemical Corp., 437 F 2d 1336 (9th cir 1970); Poller v. Columbia Broadcasting System, 368 US 464, 7 L ed 2d 458, 82 S Ct 486 (1962); Mt. Lebanon Motors, *supra*. The evidence shows that under the Ford distribution system, there are two types of enterprises which may be called factory stores for the purpose of this case. Generally speaking, Ford has relied upon independent dealers or dealers to distribute its product, and historically this is true of the whole automobile industry. Dr. Staelin quoted from a book by Alfred P. Sloane, Jr., long time President and Chairman of General Motors Corporation, to the effect that the independent dealer is a person upon whom the automobile industry depended for success. The evidence shows however, as did the evidence adduced in Mt. Lebanon Motors, Inc. v. Chrysler Corp., 283 FS 453 (W.D.Pa. 1968) aff'd by the Third Circuit 417 F 2d 622 (1969) that Ford Motor Company, like Chrysler Corporation had some time in the 1960s begun to develop so-called factory stores which were enterprises wholly owned by the Ford Motor Company and whose officers and employees were actually managers sent out by

Ford to manage the enterprise. In addition, there were also dealer development stores where a prospective independent dealer would have insufficient capital to take over a dealership on his own, and a part of the capital would be advanced by the Ford Motor Company. If the enterprise was profitable, the profits would be used to purchase the stock for the independent dealer who would eventually own the dealership. If, however, the enterprise was unprofitable, the losses would be deducted from the proposed dealers investment and then when this was wiped out the dealership would become a wholly owned factory store. The evidence shows that Ford went to considerable lengths to conceal the fact that certain dealerships were factory owned or were dealer development stores which had become company owned. While the main thrust of plaintiffs' evidence was aimed at the factory store known as Triangle Ford located on Baum Boulevard in Pittsburgh, Pensylvania in so-called "automobile row", nevertheless the evidence showed that at various times there were other factory stores or dealer development stores which lapsed into the category of company owned such as Northland Ford, South Hills Lincoln-Mercury, Gateway Lincoln-Mercury, Crest Lincoln-Mercury, Liberty Ford, Northway Lincoln-Mercury, East Hills Ford and Allegheny Ford Truck Sales (See Plaintiffs' Exhibit 239). This exhibits shows that these stores sold 6703 units in varying periods of time during the years involved and also shows the losses incurred by them during the period which averaged $121.05 per vehicle. There was also testimony that Ford Dealers were in competition as to many models with Lincoln-Mercury Dealers.

Whether dual distribution is or is not illegal or evil in and of itself, it does become an antitrust problem in the context of its use by a company possessing substantial market power. (See hearings before Select Committee on Small Business cited at page 61 of plaintiffs' brief.) The evidence here shows that Ford Motor Company, the defendant, is the only source of Ford and Lincoln-Mercury automobiles, trucks and other automotive products. An independent Ford Dealer has a large investment in money and good will tied up in Ford vehicles and facilities for them. Under the terms of the sales agreement, he must use his best efforts to achieve the full extent of Ford market penetration reasonably anticipated in his area. He cannot turn to another manufacturer for vehicles. If he is shut off, he strangles to death in a short time. Thus, if Ford for its own purpose chooses to use its company stores and dealer development agencies for the purpose of maximizing its profits through large subsidies to these company-owned facilities with the result that private dealers are put at a substantial economic disadvantage, it is the court's opinion that a cause of action is made out under Sherman 1. It has been well stated in this case that Ford is a sub-market among automobiles because of the very nature of the distribution system of new cars and we have no further factor that it is stated that the loyalty percentage (the tendency to return to purchase a new Ford as a replacement for a present car) of Ford owners is as high as 90%. Since Ford has 25% of the market for new cars in this country, it certainly is a substantial part of the trade or commerce among the several states as described in Section 2 of Sherman or in holding it to be substantial portion of trade which may be restrained under Sherman Section 1.

Evidence showed that Triangle Ford, a wholly owned company store (Tr. 1040), spent from two to three times as much for advertising per new vehicle as independent dealers. Backed as it was by the resources of the manufacturer, independent dealers could not possibly keep up with the amount of advertising placed by Triangle Ford (Tr. 1060 and 135). The company dealership was able to afford many more salesmen than a private dealer could finance (Tr. 137). The evidence also indicated that the defendant was able to infuse large sums of capital into this company store and chose to provide therein much better facilities than a private dealer could supply. When the money ran low, Ford Motor Company would make more capital contributions either by way of stock purchases or lending on notes (Tr. 1074). When the manager of Triangle protested about the losses they were incurring, he was told that Ford did not care what it cost or what he spent as long as he got the numbers out, *i.e.,* moved a large number of automobiles. He was told that Ford did not care what they lost or what it cost to sell the cars (See Tr. 1064 and 1144). This is a classic example of what Judge Dumbauld in Mt. Lebanon Motors, *supra,* calls the use of adventitious profits to subsidize a local dealer and which Dr. Staelin described as maximizing profits by subsidizing losses. Thus it is pointed out that Ford was still making a profit on each car sold and also getting an income tax deduction for any losses incurred by a subsidiary. These losses over the years in question which were subsidized by Ford came to more than $500,000.

The result was to place plaintiff at a competitive disadvantage. This was more than he could afford to spend

for advertising and for salesmen. (See pp. 1171 and 1249 of transcript for detailed figures.)

At Tr. 5108, the court in its charge discussed these factors with the jury and at 5123 told the jury that there was nothing wrong with dual distribution as such but they should consider this in the light of testimony of various Ford executives as to using this method for the purpose of dominating the market in certain metropolitan centers. The jury was also told of Ford's explanation for factory stores, that they regarded them largely as temporary expedients in areas where they wanted to have a dealer but were unable to secure one at the time. The jury could consider however that Triangle Ford was in business insofar as this case is concerned for a period of six years. It was stated that the only reason for a factory store to be continued over a long period of time existed where they wanted to continue to have representation but felt they never would be able to get a dealer, such as in Manhattan. There was also testimony that by the time of the trial the number of factory stores throughout the country had been drastically reduced. It appears however that this effort to reduce the number of factory stores started after this suit was brought, and as to what weight the jury would give this testimony under these circumstances was a matter for them to decide. This disposes of defendant's reason for new trial 23(bb) relative to discrimination and the infusion of capital into factory owned stores.

The court did not tell the jury that this conduct on the part of Ford was necessarily a *per se* violation of Sherman Section 1 but the jury was told that they had to find that

this was an unreasonable restraint of trade under the circumstances. The above discussion disposes of defendant's reasons for new trial number 23(d) as to a substantial amount of trade being involved, 23(e) complaining that the jury was told that the amount of trade was immaterial, and 23(f) as to telling them that the motives of the defendant was immaterial. The court never told the jury that there was an unreasonable restraint of trade or a *per se* violation of the Sherman Act. Whether antitrust violations existed was entirely left to the jury to decide. The extent to which the defendant has gone in grasping for arguments to justify a new trial is shown in reason 23(z) where a quotation was taken from the transcript of the charge where the court is alleged to have said, "which *I* claimed to be violated". It appears that this was a typographical error in the transcript which the reporter has corrected to show what was actually said, *i.e.*, "which *it* claimed to be violated". An examination of the charge as a whole will show that such a remark if made would have been entitrely inconsistent with the rest of the charge. At page 5059, the jury was told to consider the charge as a whole. No exception was taken to this remark.

Defendant further argues that if there was any attempt to dominate this market or a conspiracy to drive out independent dealers, it ended in 1967, when Mr. Schrol left Triangle Ford, because of certain testimony by his successor. The jury did not have to believe this testimony. They could well conclude that the testimony of Mr. Iacocca and others about their attempts to dominate the market continued up until shortly before trial when they made a hurried effort to get rid of company owned stores. De-

fendant also claims that the statements attributed to Mr. Iacocca, Mr. Callas and other Ford executives were made before 22 Ford was formed. This may be true but the evidence shows that the intent expressed in these statements of Ford executives continued for several years in the Pittsburgh metropolitan area.

The best exposition of the application of antitrust laws to a situation of this kind is found in the exhaustive opinion of Judge Dumbauld of this court in Mt. Lebanon Motors Inc. v. Chrysler Corp., 283 FS 453 (W.D.Pa. 1968) aff'd 417 F 2d 622 (3d cir 1969).

The facts in Mt. Lebanon were strikingly similar to those of the instant case, and in Judge Dumbauld's opinion is a thorough exposition of the principles of antitrust law applicable to situations of this kind. It will be noted that in Mt. Lebanon, *supra*, the court held as did we here that there was no violation of the Robinson-Patman Act in the financing of company stores and dealer development stores. There was no evidence of price discrimination as such between dealers in the Pittsburgh area (See Tr. 5067), and we held that absent such price discrimination between dealers, there was no violation of the Robinson-Patman Act (15 U.S.C. 13) or Section 3 of the Clayton Act. Favorable terms of leasing and conveyances of real estate are not a violation of Robinson-Patman as charged by plaintiffs: Export Liquor Sales, Inc. v. Amex Warehouse Co., 426 F 2d 251 (6th cir 1970). Financial advantages derived by advancing large amounts of money to a factory store dealership also did not amount to price cutting in violation of the Robinson-Patman Act. The Robinson-Patman Act

has nothing to do with extensions of credit or things of that nature. (See Mt. Lebanon at pages 457, 458); Kapiolani Motors v. General Motors Corp. (D.C.Hawaii, 1972) 337 FS 102; Texas Gulf Sulphur Co. v. J. R. Simplot Co., 418 F 2d 793 (9th cir 1969); Secatore's, Inc. v. Esso Standard Oil Co., 171 FS 665 (D.Mass. 1959); I. M. Skinner v. United States Steel Corp., 233 F 2d 762 (5th cir 1956).

The Mt. Lebanon Motors court, however, went on to hold that the facts there did justify, as we held in the instant case, a finding by the jury that there was a violation of Section 1 of the Sherman Act and because of the thoroughness of that opinion, we quote at length from it in this respect.

> "Plaintiff offered evidence tending to show that the Chrysler financed dealerships, commonly called 'factory stores', *engaged in price-cutting and massive advertising, to the detriment of privately financial dealerships in the Pittsburgh area,* which were not able to afford advertising on such a large scale or to accept profits as small as those obtained by the factory stores in their deals with customers.
>
> "Plaintiff's proof tended to show that the factory stores consistently lost money and were unprofitable; but that from time to time, when circumstances required, Chrysler would make gifts or additional investments in the form of 'capital contributions' to the factory-financed dealerships, thus enabling them to continue in business, notwithstanding their losses resulting from their normal operations.

"There was also evidence that the 'dealer enterprise' division of Chrysler would from time to time furnish temporary employees to the factory stores when they experienced a shortage of adequate personnel and would furnish assistance to the factory stores in establishing their accounting systems and would also furnish substantial advertising allowances in launching the new dealerships.

* * *

"Upon renewal of defendant's motions at the close of all the evidence, we adhere to the view that a jury question is presented with respect to whether or not Chrysler has violated Section 1 of the Sherman Act . . .

"We are satisfied that there is no problem with respect to finding the existence of a contract, combination, or conspiracy.

"Chrysler Corporation manufactures motor vehicles and sells them at the source to its wholly owned subsidiary Chrysler Motors Corporation. Chrysler Motors Corporation enters into contracts, designated sales agreements, with each franchised dealership, which is a separate corporation. In the case of factory stores, whether wholly owned or under the DE plan, Chrysler Motors Corporation owns stock, and designates directors, and controls the activities of the dealership to the extent provided in the sales agreement. Chrysler Motors Corporation also seeks out and engages individuals to act as manager of the factory stores and enters into contractual agreements with

them, including in some cases special provisions for bonus in addition to the salary paid as manager of the factory store.

"While there is no occasion in the case at bar to go so far as to attempt to find a 'bathtub conspiracy' between a corporation and its own employees, it seems clear that here there are a sufficient number of separate legal persons, both individual and corporate, to constitute a combination or conspiracy. Corporate affiliation or common ownership does not insulate against liability for violation of the antitrust laws. United States v. Yellow Cab Co., 332 US 218, 227, 67 S Ct 1560, 91 L ed 2010 (1947); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 US 211, 215, 71 S Ct 259, 95 L ed 219 (1951); Timken Roller Bearing Co. v. U. S., 341 US 593, 597-598, 71 S Ct 971, 95 L ed 1199 (1951).

"Turning to the substantive question as to the nature of the restraints forbidden by Section 1, it is to be noted that since the famous decision in the Standard Oil Co. of New Jersey v. United States, 221 US 1, 63-64, 31 S Ct 502, 55 L ed 619 (1911), the Act has been interpreted as if the word 'unreasonable' were inserted before the word 'restraint'. Subsequently the 'rule of reason' has been modified by the development of rules declaring certain restrictive practices to be unreasonable restraints per se. These *per se* violations include, for example, price-fixing, resale price maintenance enforced by concert of action without the benefit of statutory legitimization, euphemistically sometimes referred to as 'fair trade' laws, concerted

boycotts or refusal to deal, secondary boycotts, or tying a patent to the use of unpatented materials. See United States v. Columbia Steel Co., 334 US 495, 522, 68 S Ct 1107, 91 L ed 1533 (1948).

"We are aware of no authorities indicating that the facts alleged in the case at bar would constitute a violation *per se*. They may well, however, support a charge of unreasonable restraint. Chrysler's forward integration somewhat resembles the 'sheet squeeze' employed by Alcoa. United States v. Aluminum Co. of America, 148 F 2d 416, 436-437 (C.C.A.2, 1945). Moreover, they do appear to present a jury question as to whether there has been an unreasonable restraint of trade of the classical pattern engaged in by the Standard Oil Company which may have contributed to the enactment of the Sherman Act. Predatory price-cutting in one locality, subsidized by adventitious resources, for the purpose of eliminating competition and then presumably raising prices to a non-competitive level, constitutes a classical example of restraint of trade.

"The adventitious advantage, unrelated to the competitive merits of the competing sellers in the market involved, may be of a geographical nature, as where a large national company cuts prices in a limited local geographical area; or the adventitious advantage may be derived from profits obtained in a different line of commerce, as in the case of the conglomerate mergers which are so popular today

* * *

"To eliminate competition by putting out of business one dealer after another individually, by excluding competitors from any substantial market, constitutes a restraint of trade, even if there is no general effect upon the economy as a whole. International Salt Co. v. United States, 332 US 392, 396, 68 S Ct 12, 93 L ed 20 (1947); Klor's Inc. v. Broadway-Hale Stores, 359 US 207, 213, 79 S Ct 705, 3 L ed 2d 741 (1959)."

Another case dealing with the use of adventitious profits to put competitors at a disadvantage is Reynolds Metals Co. v. FTC, 309 F 2d 223 (D.C.Cir. 1962). (See reference by Burger, Circuit Judge, now Chief Justice, to the "Deep pocket" p. 229.)

The jury was instructed at Tr. 5097 that they must find that these procedures by Ford unreasonably interfered with free pricing or distribution and the jury so decided. We must always remember that the "theory in back of the Sherman law is to protect the free movement of goods in interstate commerce against unreasonable restraints to assure open interstate markets where traders may freely negotiate sales and to preserve the normal competitive forces which otherwise might operate in these markets." U. S. v. General Motors Corp., 121 F 2d 376 at 403 (7th cir 1941). The jury here was justified in finding that the operation of factory stores and dealer development stores under these circumstances by Ford Motor Company did interfere with the normal competitive forces which would otherwise operate in the retail sales of automobiles in the Pittsburgh area.

(2) Fleet Sales to National Leasing Companies.

The defendant claims that it was not apprised of the nature of plaintiffs' claims with respect to sales to national car rental fleets. At pages 14 and 15, however, of plaintiff's pretrial statement, it was clearly set forth that plaintiff was claiming discounts, fixing of prices, subsidization of advertising budgets and special allowances to national car rental fleets. It therefore appears that defendant had ample notice of the nature of this claim.

The evidence shows that plaintiff, 22 Ford, Inc., engaged in sales of cars to national fleet leasing companies, particularly Avis and Hertz, from 1964 to 1970 at which time plaintiff refused to participate in these sales any longer. The evidence is that a title to an automobile sold to one of the national fleet leasing companies first passes from the defendant to a dealer. The dealer then has to put the car in shape for operation, provide the Pennsylvania inspection sticker, and deliver the car, having assumed the warranty to Hertz or Avis at the Pittsburgh Airport, a distance of 16 to 18 miles.[7]

The dealer, however, does not determine the price at which the car is sold to Hertz or Avis. (Plaintiffs' Exhibit 218 being plaintiffs' book of invoices reflecting sales to these leasing companies shows that the invoice when received from the factory indicates the price at which the car is to be sold to Hertz or Avis.) Invariably, the price was the invoice price to the dealer plus $50.00 less 1%.

[7] When the words "Hertz or Avis" are used herein, they refer to Hertz Car Rental Service and Avis Car Rental Service, national leasing corporations.

For example, if the price to the dealer was $2,500, he would add $50.00 to it making $2,550 and then subtract 1% or $25.50, making the net price to Hertz or Avis of $2,524.50. The dealer would thus have $24.50 left to cover the above-mentioned costs. He was charged interest by the company owned finance company from the date of *the delivery* of the car to him, whereas Hertz or Avis would not pay the invoice for 30 or 60 days with the result that after paying the interest owing to the finance company he was left with a loss on the sale of the car. It is true that the dealer was not forced to engage in these sales to fleet rental companies but on the other hand he had to use his best efforts to "get out the numbers" (sell as many Fords as possible under his franchise or be charged with dereliction). We can well understand why plaintiff and other dealers would feel that they had to go along with this arrangement (See Tr. 239, Plaintiffs' Exhibits 183, 184 and 185).

This method of compelling dealers to charge the same price to the national fleet leasing companies has been in effect for some years. It makes no difference whether the car is large or small (Tr. 250) and there can be little doubt that defendant Ford fixed the price at which these cars were to be sold to Hertz or Avis. When witness Schroll of Triangle Ford once attempted to negotiate some other terms with Hertz and Avis and even attempted to negotiate a lower price which would result in greater losses, he stated 1193, 1194 that this suggestion was turned down by the national fleet office of Ford Motor Company as disrupting their national fleet program. The testimony as to the standard arrangements with Hertz and Avis is sup-

ported by the testimony of Schrekengost (Tr. 1741, *et seq.*) and Wood (Tr. 1561, *et seq.*).

Further facets of the sales to national leasing companies included arrangements for buy back of the cars after the lapse of a summer rental season in which case the Ford Motor Company guaranteed Hertz or Avis the price they would receive for repurchase which the dealer had to promise to abide by (See Schroll 1204, Schrekengost 1757). The effect of this, however, was somewhat minimized by Ford agreeing to reimburse the dealer for a part of the losses which he would sustain by agreeing to the repurchase price.

Other arrangements between Ford and Hertz and Avis included rebates included in the purchase price covering various accessories which would be invoiced at "no charge" such as side moldings, nylon carpeting, courtesy lights, certain types of tires and a more powerful engine for the price of a cheaper engine (See Rea 225, Plaintiffs' Exhibits 106, 218). Nowhere during the trial of this case did Ford attempt to rebut this testimony or claim that these prices or arrangements were not fixed in advance.

The court in its charge (Tr. 5112) left it to the jury to determine whether the testimony on these arrangements showed a restraint of trade in violation of Sherman Act, Section 1. We can well understand that with the tremendous purchasing power of Hertz and Avis any automobile manufacturer would be under great pressure to fix maximum prices for which these large companies could buy their fleets. For example, the testimony shows that Avis alone purchases approximately 1700 cars in the Pittsburgh

area each year. But this is no grounds for allowing price fixing, a *per se* violation of the Sherman Act. U. S. v. Socony Vacuum Oil Co., 310 US 150, 84 L ed 1129, 60 S Ct 811 (1939).

It is true that there is no direct evidence of any express agreement between Ford Motor Company and Hertz and/or Avis to determine the prices at which these fleet dealers would purchase new Ford automobiles, but again this is something which the jury was entitled to infer from the circumstances. American Tobacco Co. v. U. S., *supra*. In view of the uniform testimony as to the formula adopted by Ford for sales to Hertz and Avis and in view of there being no refutation of it, it is difficult to see how the jury could arrive at any other conclusion.

Price fixing may be horizontal in nature, *i.e.*, among competing sellers on the same level, or vertical in nature, *i.e.*, between a manufacturer and purchaser of his products. See U. S. v. Arnold Schwinn & Co., 388 US 365, 18 L ed 2d 1249, 87 S Ct 1856 (1967); Knuth v. Erie Crawford Dairy Cooperative Assn., 463 F 2d 470 (3d cir 1972). In Knuth the court said, "Next there is no evidence that the cooperative attempted to impose upon any handler or that any handler agreed to any vertical arrangement respecting resale milk prices." In the case at bar there is ample evidence to the effect that Ford imposed these price arrangements for sales to Hertz and Avis upon its dealers. The jury was told (Tr. 5008) that if they found a combination to fix prices then there need be no question of unreasonableness to be considered. The jury was also told (p. 5101) that if there was a *per se* violation, then motives and business reasons were immaterial and they

were properly allowed to consider special prices to fleets as antitrust violations. This disposes of reasons 23(f) and 23(g) of reasons for new trial. It was however left to the jury at Tr. 5119 to determine whether there had been a fixing of prices under the evidence in this case. The foregoing discussion also disposes of reason 23(n) of reasons for new trial. It will further be noted that no exception was taken to these instructions.

The foregoing holdings and rulings are in accord with the court decisions on the subject. Fixing maximum prices is as much a violation of the antitrust laws as fixing minimum prices. Albrecht v. The Herald Co., 390 US 145, 19 L ed 2d 998, 88 S Ct 869 (1968). Kiefer Stewart v. Joseph E. Seagram & Sons, Inc., *supra*. Price fixing is unlawful *per se* under the Sherman Act except as allowed by the Miller-Tydings Amendments. U.S. v. Bausch & Lomb Optical Co., 321 US 707, 88 L ed 1024, 64 S Ct 805 (1944). As to advertising allowances, see P. Lorrillard Co. v. FTC, 267 F 2d 439 (3d cir 1959). There is a violation where all parties are constrained to sell at a suggested price. U.S. v. Parke Davis & Co., 362 US 29, 4 L ed 2d 505, 80 S Ct 503, (1960). See also, Timken Roller Bearing Co. v. U.S., 341 US 593, 95 L ed 1199, 71 S Ct 971 (1951); U.S. v. Ward Baking Co., 376 US 327, 11 L ed 2d 743, 84 S Ct 763 (1964).

In White Motor Company v. U.S., 372 US 253, 9 L ed 2d 738, 83 S Ct 696 (1963) the court said, "Price fixing arrangements both vertical and horizontal have also been held to be *per se* violations of the antitrust laws and a trial to show their nature extent and degree is no longer neces-

sary." This case also involved sales to fleet accounts as well as to Federal, State and local governmental units and agreements covering the prices of parts and accessories to these customers. An injunction restraining price fixing was affirmed but the portion of the case dealing with legality of territorial and customer restrictions was held to be a matter to be determined after trial and the case was remanded for that purpose.

The damages resulting from this antitrust violation were not very large. Dr. Staelin, using plaintiffs' exhibit 218 showing 450 such sales by plaintiffs, computed an average damage figure per car of $76.00. See Tr. 2953, 2954, 2961. This gave a total damage estimate of $34,200.

Before leaving Sherman Section 1, we will at this point refer to two reasons for new trial which raise questions involving the Robinson-Patman Act. In reason 23(b), the complaint is that the court erred in instructing the jury with respect to the Robinson-Patman Act and price discrimination. The court at Tr. 5,008 told the jury that there was no cause of action for price discrimination under the Robinson-Patman Act and that they could not find for the plaintiff on any such cause of action. See also Tr. 5,067 and 5,087 and 5092. In view of the fact that there had been references to this act throughout the trial, the court felt that the jury should be informed what was prohibited by this act and why they could not find for the plaintiff on this score. Further, in reason 23(r) complaint is made that the jury's attention was called to the Clayton Act. The jury was told that they should consider the totality of Ford's conduct in determining whether there were viola-

tions of the Sherman Act. They were, however, told that it was extremely doubtful that there was any cause of action for violation of the Clayton Act with respect to exclusive dealing since there was little evidence of any effect upon competition. The jury apparently heeded this admonition and in their answer to interrogatory 8 stated that they found no violation of Section 3 of the Clayton Act.

No exception was taken to these instructions and we find no grounds for new trial, or Judgment *NOV*.

IV. *Sherman Act Section 2; Monopolization and Attempt to Monopolize.*

At the close of the trial, the court held that there was no evidence of monopolization under the first clause of Section 2 of the Sherman Act.[8] A verdict was therefore directed for defendant on this branch of the case. The basis for this holding was that there was no evidence that Ford Motor had ever succeeded in establishing a monopoly on the sale of automobiles (having only 25% of the market) or even anything approaching a monopoly on the sale of its own cars. There were shown to be 164 Ford dealers in the relevant geographical area in 1964 and 142 dealers in 1972 (Deft's Exhibit 202). Therefore, giving Ford credit for operation of all possible factory stores and dealer development stores in the area, these never approached 50% let alone a monopoly of Ford Dealerships.

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[8] "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor . . ."

The court did, however, permit the question of *attempt* to monopolize go to the jury which found the defendant guilty of such attempt. This finding was amply supported by the testimony in the case. Much of the evidence with respect to Sherman Act Section 1 was of course relevant to the problems arising with respect to Sherman Act Section 2 and there was sufficient evidence of specific intent to attempt to monopolize in the statements attributed to Messrs. Callas, Barclay and Iacocca heretofore discussed, which indicated intent to dominate the markets in the twenty major metropolitan marketing areas in the country including Pittsburgh.

It is a violation of Sherman 2 and a prohibited attempt to monopolize for a person or a group of persons to conspire or combine to secure a dominant share of a market through restraint of trade or predatory practices. It is not necessary that the plaintiffs show that monopolization was actually achieved. It is sufficient if there was an attempt to monopolize or a combination or conspiracy to monopolize any part of trade or commerce. Lorain Journal Co. v. U.S., 342 US 143, 96 L ed 162, 76 S Ct 181 (1951).

The best exposition of an attempt to monopolize in the new car business is found in the decision of this court in Mt. Lebanon Motors, Inc. v. Chrysler Corp., 283 FS 453 (W.D.Pa. 1968) aff'd 417 F 2d 622 (3d cir 1969).

> "Turning to the charges under Section 2 of the Sherman Act, it must be noted that that Section specifies not one but three offenses. The section provides 'Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other

person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor' (15 U.S.C. 2). Monopolization, attempt to monopolize, and conspiracy to monopolize are separate offenses.

"Monopolizing is judicially defined as acquiring or maintaining dominant market control, with the power to raise or fix prices at a non-competitive level or to exclude or eliminate competitors from the market (Citations omitted.)

"There is considerable discussion in the cases regarding the 'relevant market' in situation involving Section 2. To begin with the section itself speaks of monopolizing 'any part of the trade or commerce among the several states, or with foreign nations'. It has long been held that 'The commerce referred to by the words "any part" construed in the light of the manifest purpose of the statute has both a geographical and a distributive significance, that is it includes any portion of the United States, and any one of the classes of things forming a part of interstate or foreign commerce.' Standard Oil Co. v. U.S., 221 US 1, 61 (1911). Thus trade in a particular geographical area or in a particular article of commerce is sufficiently identifiable as a 'part capable of being restrained or monopolized.'

"Thus commerce in Dodge automobiles at the retail level in Allegheny County is a sufficiently identifiable 'part' of interstate commerce to be susceptible of restraint or monopolization. U.S. v. Klearflax Linen

Looms, 63 FS 32, 39 (D.Minn. 1945). The Klearflax case illustrates the distinction between the natural and inevitable monopoly of any manufacturer over its own goods at the manufacturing level and the monopolizing of the business of retail selling of such goods on the retail level. The case also indicates that an unlawful restraint may exist with respect to a particular type of product indeed the product produced by a single manufacturer.

"U.S. v. General Motors Corp. (1940-1943 Trade Cases Para. 56,139), 121 F 2d 376, 400 (C.A. 7, 1941) contains another clear elucidation of the distinction between the trade and commerce of the manufacturer at the manufacturing level and that of the dealers in General Motors automobiles at the retail level, and holds that the latter is susceptible of illegal restraint by the manufacturer.

• • •

"The essence of monopoly being power to control prices and exclude competition, Lessig v. Tidewater Oil Co., 327 F 2d 459, 474 (C.A. 9, 1964), there may exist situations in which such power cannot be effectively established if fungible substitute products are available in the market. U.S. v. DuPont and Co., 351 US 377, 392-95 (1956). This would seem to be the situation in the case at bar.

"Product differentiation through advertising, styling, and other features is common in the automobile industry. There has been testimony in the case indicating that much of the business of a dealership con-

sists in selling new cars of the same make to loyal customers. It is common knowledge, however, that there is a limit to the brand loyalty of automobile purchasers.

* * *

"Thus it seems clear that no effective price control by Chrysler or exclusion of competition, amounting to monopolization, could be effective in the Allegheny County market in face of the competition of General Motors, Ford and other manufacturers. The brand loyalty of Dodge owners would undoubtedly dissipate in the face of price increases to a monopolistic level. No successful monopolizing of the Allegheny County market for Dodges could be achieved without collusive or coercive arrangements rendering ineffective the competition of other makes and no evidence of any such arrangements is in the record in the case at bar. We therefore must grant the motion for directed verdict with respect to the charge of monopolizing, under Section 2." 283 FS at 460-61.

The court discussed attempt and conspiracy to monopolize as follows:

"With respect to the second offense under Section 2, attempt to monopolize, the situation is different. Here 'The acts of attempted monopolization condemned by Section 2 of the Sherman Act are those performed with the specific intent to unlawfully monopolize, but falling short of the goal.' U.S. v. Charles Pfizer & Co., 245 FS 737, 739 (E.D.N.Y. 1965). As there said: 'The gravamen of attempt is the specific intent to commit an illegal act, but falling short of completion.'

"'Because the antitrust laws strike equally at nascent and accomplished restraints of trade, monopolistic design as well as results are reached by the prohibitions of the Sherman Act.' Times-Picayune Publishing Co. v. U.S., 345 US 594, 622-23 (1953).

"An attempt is, as the term indicates, a conative effort to achieve a result. The mere failure to succeed, or the impossibility of success, does not negative an attempt. When the Memorial Day races are held in Indianapolis, there is only one victor, but all the entrants attempt to win.

"The mental or volitional element is significant in the case of an attempt. Specific intent is necessary ingredient of an attempt when the acts performed fall short of the results condemned by the Act (Citations omitted).

"Likewise with respect to the third offense under Section 2 of the Sherman Act, conspiracy to monopolize, intent, as evinced in concerted action, rather than possibility of success, is the crucial factor. For this offense the existence of a conspiracy is essential; whereas the cognate offenses of monopolizing or attempting to monopolize can be performed unilaterally by a single party. 283 FS at 461-462."

When the gloss of years of judicial decisions is stripped from Section 2 of the Sherman Act, we must again consider words as they were originally enacted: "Every person who shall – – – *attempt to monopolize* or combine or conspire with any other person or persons to monopolize *any part of the trade* – – –". In view of the fact that Ford

as a member of an oligopoly possesses 25% of the market for new automobiles in this country, it would seem that an attempt by Ford to monopolize the sale of its new cars through subsidiaries operating as factory and dealer development stores in major metropolitan communities to dominate the markets in these communities to the injury of and in competition with its independent dealers should be considered an attempt to monopolize this part of the market for new automobiles. When it combines or conspires with its wholly owned subsidiaries it is likewise guilty of a conspiracy to monopolize this part of the trade among the several states.

Ford is the only source of Ford and Lincoln-Mercury motor vehicles. A Ford or Lincoln-Mercury dealer must, under the terms of his franchise, fulfill his fair share of the market penetration expected in his area by the manufacturer. He has no place else to go to secure new vehicles for sale. He cannot turn to another of the big three American manufacturers. His investment in facilities and goodwill, if it is to be productive, must be tied in with sales of Ford vehicles. It would therefore seem that the sale of Ford cars is an important submarket of the market for sales of new cars. The evidence shows that owner loyalty to Ford products is as high as 90%. Hence, it would seem that to apply the fungible product theory, *i.e.*, that every new car is the same as another, is completely unrealistic. See *e.g.* U.S. v. Guerlain, Inc., 155 FS 77 (S.D.N.Y. 1957) involving the appeal of a perfume with a highly exploited trademark.

We realize that the courts are badly split with respect to this problem. Some courts blindly follow the decision

of the United States Supreme Court in the Cellophane Case, U.S. v. E. I. DuPont DeNemours and Co., 351 US 377, 100 Led 1264, 76 S Ct 994 (1956) without examining the basis for this decision and without ascertaining what may be dicta in the opinion. This was a case involving actual monopolization, not an attempt to monopolize, and the court unquestionably held that for a manufacturer to obtain a monopoly of the sale of its own product is not a violation of Sherman Act Section 2 where there are other commodities "reasonably interchangeable by consumers with the manufacturer's own product". This may be true of a plastic packaging material such as Cellophane but not necessarily true of a product such as an automobile manufactured under a highly exploited and widely advertised trademark and to which there is, as shown, a high percentage of owner loyalty.

We recognize that many cases do apply the DuPont case to attempts to monopolize and hold that the relevant product market cannot consist solely of the products of one manufacturer unless of course they are unique. See, *e.g.*, Cal Distributing Co. v. Bay Distributors, Inc., 337 FS 1154 (M.D.Fla 1971) (wines); Al Business Machines Co. v. Underwood Corp., 216 FS 36 (E.D.Pa. 1963) (business machines); and the motor vehicle cases Packard Motor Car Co. v. Webster Motor Car Co., 243 F 2d 418 (D.C.Cir 1957); Madsen v. Chrysler Corp., 261 FS 488 (N.D.Ill. 1966); Johnny Mattox Motor Co. v. Ford Motor Co., 202 FS 103 (W.D.Tex. 1960).

There are also cases holding that in attempts to monopolize cases the evidence must show a dangerous probability

of success. In the instant case, the court did not charge on the dangerous probability of success but, on the other hand, no exception was taken to this failure at the close of the court's charge which would clearly be required if defendant is going to claim error as a result of such omission. See Morely v. Braca, 456 F 2d 1252 (3d cir 1972) and Federal Rule Civil Procedure 51.

In other words, it appears to be defendant's contention that to have a case where plaintiff can recover on an attempt to monopolize you must have (1) specific intent, (2) a relevant product market not limited to the automobiles of one manufacturer and (3) a dangerous probability of success. Since defendant claims that elements 2 and 3 are missing here, there can be no recovery under Sherman Section 2.

We believe that the better line of case is in accordance with the reasoning in Mt. Lebanon Motors, *supra*, and it is best expressed by the Ninth Circuit in Lessig v. Tidewater Oil Co., 327 F 2d 459 (9th cir 1964). That case clearly holds that the relevant market is not an issue in an attempt to monopolize case and that probability of monopolization is not essential to an attempt to monopolize. The court holds only specific intent to monopolize is required and points out that the "actor is better able than others to judge the practical possibility of achieving his illegal objective" than anyone else and that the fact he intends to monopolize is therefore enough.

Lessig, *supra*, relies upon Swift and Co. v. U.S., 196 US 375, 49 L ed 518, 25 S Ct 276 (1905); Union Carbide & Carbon Corp. v. Nessley, 300 F 2d 561 (10th cir 1961) and

particularly U.S. v. Consolidated Laundries, 291 F 2d 563 (2d cir 1961) which only require that there be an appreciable part of the market involved as there is in our case.

A good exposition of the problems involved in this area is found in the recent cases of Woods Exploration Co. v. Aluminum Co., 438 F 2d 1286 (5th cir 1971) and in Industrial Building Materials, Inc. v. Interchemical Corp., 437 F 2d 1336 (9th cir 1970). See also Article by Professor Donald F. Turner, 70 Harv. L.R. 281.

Regardless, however, of whether the court erred in instructing the jury with respect to relevant product market and also erred in not instructing on dangerous probability despite no exception and whether there was sufficient evidence of relevant product market as consisting of new Ford vehicles and dangerous probability, this should not affect the outcome of the case. There was ample evidence to support the jury's findings of violation of Sherman Section 1. The jury's answers to interrogatories found violations of both Sherman 1 and Sherman 2 and the jury was instructed that if they found violation of either or both of these sections, they could award damages to plaintiff. The award of damages therefore should stand.

We should at this point discuss certain other reasons for new trial advanced by defendant. Claim is made in reason 23(bb) of the instruction of the court (Tr. 5114) that the jury was told that they should consider the picture as a whole and not break the evidence down into separate compartments.

The United States Supreme Court has clearly stated that the evidence must not be fragmentized or compart-

mentalized whereby you stop after each segment of evidence and determine whether it constitutes an antitrust violation in itself and then wipe the slate clean after scrutiny of each segment. The court has held the jury should look at the whole picture. Continental Ore Co. v. Union Carbide Corp., 370 US 690, 8 L ed 2d 777, 82 S Ct 1404 (1962); Lessig v. Tidewater Oil Co., *supra*. As a matter of fact, many of defendant's arguments must fail because of inability or unwillingness to recognize this principle.

The defendant also complains in reason 23(f) of the court's instructions that motives were immaterial if the jury found violation of the antitrust laws (Tr. 5101). This is in accordance with U.S. v. General Motors Corp., 384 US 127, 16 L ed 2d 415, 86 S Ct 1321 (1966) and would not constitute error.

V. *Damages*

We have previously discussed the matter of damages resulting from breach of contract determined by the jury to be $29,683 and the damages resulting from violation of the Automobile Dealers Act assessed at $350,000 which we have previously sustained. We have also confirmed that portion of the damages for violation of the antitrust laws generally resulting from price arrangements with respect to fleet sales in the amount of $34,200 which was included in the figure of $1,750,000 which the jury awarded in their answer to interrogatory 9 for the total violations of the antitrust laws. Defendants claim that the total amount was excessive, that the evidence of the witness Dr. Staelin

to support the figure was improperly admitted and that the evidence of damages was speculative, vague and conjectural.

Complaint is also made in reason for new trial 23(t) that the court should not have charged the jury with respect to treble damages. The court told the jury (Tr. 5089, 5090 and 5121) that it was to find only the amount of the actual damage. The language from Section 4 of the Clayton Act (15 U.S.C. 15) wherein it is provided that the plaintiff who is injured by a violation of the antitrust laws shall recover threefold of the amount of damages sustained was read and the jury was told that this trebling was a matter for the court after they had determined the amount of the actual damage. In view of the fact that these cases are often referred to as treble-damage antitrust suits, it was proper that the jury should be told this or otherwise they would feel they were the ones to treble the damages which would result in a much larger verdict against the defendant than was proper. This form of instruction is set forth in Devitt & Blackmar Federal Jury Practice and Instructions, Section 85.28. A new trial on this ground will be denied.

Defendant further complains (reason for new trial 23(ee) that the court erred in reading to the jury a quotation (Tr. 5116) from Bigelow Theatres v. RKO Radio Pictures, 327 US 251, 90 L ed 652, 66 S Ct 574 (1946).[9]

[9] "In such a case, *even where the defendant by his own wrong has prevented a more precise computation*, the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data,

(Footnote continued on following page)

To the same effect is the decision in Zenith Radio Corp. v. Hazeltine Research, 395 US 100, 23 L ed 2d 129, 89 S Ct 1562 (1969) where it was stated that it was enough if the illegality is shown to be a material cause of the injury and that plaintiff need not exhaust all possible alternative sources of injury. In that case the damages were calculated by showing what should have been plaintiff's share of the market. "Damage issues in these cases are rarely susceptible of the kind of concrete detailed proof of injury which is available in other contexts" (pg. 123). Incidentally, in this case the court held that a court is entitled to assume the continuance of a conspiracy in restraint of trade in the absence of clear evidence of its termination. This case also points out the deference which should be given to decisions of the triers of the fact who are usually in a superior position to appraise and weigh the evidence. In this case this deference will be accorded to the verdict of the jury.

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(Footnote continued from preceding page)

and render its verdict accordingly. In such circumstances juries are allowed to act on probable and inferential as well as upon direct and positive evidence. Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery. The most elementary conceptions of justice in public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. That principle is an ancient one and it is not restricted to proof of damage in antitrust suits, although their character is such as frequently to call for its application. The wrongdoer may not object to the plaintiff's reasonable estimate of the cause of injury and of its amount, supported by the evidence, because not based on more accurate data which the wrongdoer's misconduct has rendered unavailable."

Defendant however claims that the quotation from Bigelow labeled defendant Ford Motor Company as a "wrongdoer". It is difficult to see how the jury could be misled as to this. They were cautioned that they were not to go to the question of damages until after they had determined that there had been a violation of the antitrust laws. All of the court's remarks were carefully hedged with the words: "if you find", "what plaintiff claims is misconduct", "if you find such violations". It will further be noted that no exception was taken to this portion of the charge. See Morley v. Braca, 456 F 2d 1252 (3d cir 1972). At Tr. 5117, *et seq.*, the court discussed the testimony of all three experts: Staelin, Cyert and Geisel and at 5119 discussed the defendant's testimony as to the question of damages, the defendant claiming that no loss had been suffered. We find no error here.

The defendant further claims that plaintiff, 22 Ford, Inc., failed to show that it lost money as the result of the antitrust misconduct of the defendant. The jury was told at 5115 and 5116 that the fact that 22 Ford had some profits did not prevent recovery. It was entitled to recover what it would have made but for violation of the antitrust laws by the defendant, if the jury found that such violations were the proximate cause of such losses.

It seems clear that plaintiff in an antitrust case need not have been driven to the wall or forced into bankruptcy before a suit can be brought for violation of the antitrust laws and damages suffered thereby. See Bigelow Theaters v. RKO Radio Pictures, *supra*, and Utah Pie Co. v. Continental Baking Co., 386 US 685, 18 L ed 2d 406, 87 S Ct 1326 (1967).

Defendant further claimed that the plaintiff cannot recover for damages occurring after filing the complaint on March 6, 1967, and for this purpose cites Allen Ready Mix Concrete Co. v. John A. Denie Sons Co., 1972 Trade Cases 92008 (W.D.Tenn. 1972). The court there clearly recognized that damages may be recovered beyond the date of the filing of the complaint when such damages resulted from the original illegal acts which were the subject of the complaint. In our case, it has been clearly shown that the effects of the antitrust violations as found by the jury would and did continue for some period of time following the filing of the complaint. Plaintiff did not seek any damages for any date beyond the date of trial and with respect to the fleet leasing sales only claimed damages up to the time that he ceased to participate in the program in 1970.

It is also claimed that plaintiff, 22 Ford, cannot show that it lost the sale of one car. If plaintiff had produced a customer who was enticed to a factory store, then of course defendant would say that he had only shown the loss of one customer. Early in the case, it was determined that the relevant geographic market was the area covered by the Pittsburgh Sales Office of Ford Motor Company which included several counties in southwestern Pennsylvania and parts of adjacent Ohio, West Virginia and Maryland. The evidence showed however that generally plaintiff's sales were confined to the Allegheny County area. Plaintiff's place of business in Monroeville, Allegheny County was within a few miles of Triangle Ford on Baum Boulevard in Pittsburgh. In this day of mobility, it is reasonable to expect that customers would travel from one Ford Dealer to another in the Allegheny County area to select a

new car, particularly where they might be attracted by massive advertising and aggressive tactics of numerous salesmen. In the light of this, it is vain for defendant to say that plaintiff was not in the target area of Triangle Ford. Triangle Ford was not the only company owned store in Allegheny County but there were others and also dealer development stores and in such circumstances under Bigelow and Zenith, plaintiff had to do the best it could in its proof.

The evidence of Dr. Staelin, plaintiff's expert, as supported by his report (Plaintiffs' Exhibit 241) was that plaintiff, a private dealer, was economically hurt by the fact that the factory stores were subsidized by the defendant in large amounts for advertising promotions and a large number of salesmen. He gave the jury three estimates of damage: (1) considering subsidy to company owned stores alone, the damages amounted to $1,110,000. (2) If subsidies to Lincoln-Mercury Division, which it was testified were competitive with 22 Ford, were used, then the estimated figure would be $2,531,000 or, on the other hand, (3) offering the greatest discount to either Ford or Lincoln-Mercury in each year a figure of $3,043,000 would be arrived at.

There was still another method to be used by taking the gross profit of 22 Ford on each vehicle sold of $318 and considering the profits which would have been made had the company stores not made their sales, the jury could then arrive at a figure of $2,544,000. The jury rejected all these methods and came up instead with a figure of $1,750,000.

See Tr. 5110. It therefore appears that the figure upon which a subsidy could be based was overstated and that a truer figure would be approximately 62% of that used. Some of Dr. Staelin's figures were based upon a formula using the greatest discount of either Ford or Lincoln-Mercury in each given year and thereby he came up with a figure of $3,043,000. On the other hand, the jury also had plaintiffs' Exhibit 239 which showed a compilation of all the factory stores in the Pittsburgh sales area which were engaged in business for certain periods of time during the period 1964 to date of trial. This showed average losses per new unit sold by fleet and retail sales by each factory owned Ford or Lincoln-Mercury outlet in the area and the composite was $121.05 per vehicle over this period. Applying plaintiffs' theory that it is entitled to recover as damages this subsidy which was given by Ford to other factory stores and dealer development dealers, and which was denied plaintiffs it would seem that this is closer to the true amount of damages per car. As a more realistic figure as to how much 22 Ford with total sales of 7827 units, 1964-1972 (Pltf's Ex. 238) was damaged by failure to receive subsidies or discounts equivalent to those received by factory stores, we would arrive at a total actual damage for antitrust violations exclusive of fleet sales of $969,247.35. Adding the $34,200 damages from participation in fleet sales which is firmly supported, we arrive at a figure of approximately $1,000,000 as actual damages. This is also approximately the figure at which we would arrive if we allowed for the overstatement of the profit per car at the manufacturing plants of Ford Motor Company.

In paragraph 22 of defendant's combined motions for Judgment *NOV* or in the alternative for a new trial, it is claimed that the verdict is excessive. We agree that the amount of damages awarded for violation of the antitrust laws Sherman Act Sections 1 and 2 is excessive to the extent indicated, *i.e.*, by the sum of $750,000. We will direct that a new trial be awarded unless plaintiffs file a remittitur of this amount of actual damage for violation of the antitrust laws within 20 days from the date of this order. If such remittur is filed, we will then amend the judgment trebling the damages under the antitrust laws accordingly.

VI. *Miscellaneous Reasons for New Trial.*

The previous discussion covers most of the 45 reasons for a new trial advanced by the defendant. Three of the remaining ones do deserve some mention:

(1) *Calling certain representatives of Ford as on cross examination by the plaintiff.* The plaintiff called as on cross under Rule 43(b)[10] certain persons who were not officers or directors of Ford Motor Company but the court did rule that they qualified as "managing agents". The persons called were all persons in some position of au-

[10] "A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, *or managing agent* of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeachd by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief."

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thority for the defendant Ford Motor Company in charge of certain phases of the business at least in the Pittsburgh area.

The best discussion of what is a managing agent who may be called for cross examination is contained in Skogen v. Dow Chemical Co., 375 F 2d 692 (8th cir 1967). We are taught by the decision in that case not to be too technical or literal in our approach to determinations under this Rule and the Rule should be applied liberally to reach the demands of justice. Technicians and scientists may be called where they are the only persons with knowledge of the subject matter. The question is whether the witness' interests are identified with those of his principal and whether they act with superior authority with reference to the subject matter in a litigation. Applying these rules, we see no error.

(2) *Admission of testimony as to Automatic Radio.* Certain testimony crept into the case with reference to the installation of radios in new Ford cars. It appeared that Ford tried to induce dealers to use Motorola car radios which were manufactured by a Ford subsidiary. The dealer, 22 Ford, desired to use radios which were manufactured by another manufacturer, Automatic Radio. Eventually, Ford changed the dashboard of new Ford automobiles so as to make it virtually impossible to install Automatic Radios or any radio other than Motorola. When this testimony began to come in, it appeared that it was going to lead to something concerning an illegal tying arrangement or exclusive dealing or something of that nature. As the testimony developed however it appeared

that the plaintiff could not show how this affected its operations and to what extent it might have been damaged by any such conduct. We therefore ordered the testimony stricken and instructed the jury to disregard it. It is the opinion of the court that the admonition to the jury (Tr. 3318) was sufficient to cure this admission of evidence which the plaintiff was unable to follow up.

(3) *Refusal to Allow Witnesses to Testify as to Conversations with Mr. Callas, deceased.* Callas was one of the officials of Ford Motor Company whose statements were quoted along with those of Mr. Barclay and Iacocca relative to the intention of Ford to dominate the market in 20 metropolitan centers. This testimony was referred to in the court's charge at 5101-5109. Defendant in its case attempted to introduce evidence of certain people as to conversation they had had with Callas at luncheons and elsewhere indicating a different approach to the attempt to dominate markets by company owned stores. The court sustained objections to this. It is difficult to see that this falls within any exception to a hearsay rule. See *Corpus Juris Secundum* Vol. 31(a) Evidence Section 205 and a host of cases cited therein in Note 77. It is claimed however that such testimony should be used for the purpose of attacking the credibilty of Mr. Schroll who testified to these statements by Callas. We do not understand how statements by Callas at some luncheon indicating that he favored independent private dealers would in any way combat Schroll's credibility as to Callas' statements made at certain public meetings. If the defendant had someone who heard Schroll say that he never heard Callas make these statements or if the defendant had someone who

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*Opinion and Order*
*Defendant's Post-Trial Motions*

IT IS ORDERED that defendant's motions for judgment in accordance with the motions for directed verdict be and the same hereby are denied.

IT IS FURTHER ORDERED that the partial summary judgment entered May 5, 1971, with respect to the second and seventh causes of action be confirmed and summary judgment is entered for the defendant with respect to said causes of action.

IT IS FURTHER ORDERED that the motion for a new trial be denied except to the extent, in accordance with the foregoing opinion, it has been determined that the damages in this case are excessive. As to this contention, IT IS ORDERED that the motion for new trial be granted unless plaintiff shall file a remittitur within 20 days from the date of this order remitting all actual damages for violation of the antitrust laws in excess of $1,000,000 in which case the judgment for treble damages will be amended accordingly.

IT IS FURTHER ORDERED that defendant's motion to amend the judgment be denied except to the extent that the same is ordered to be granted in the foregoing opinion and as to such amendments a separate order will be entered.

WILLIAM W. KNOX,
United States District Judge.

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Porter Bldg. 15219

Thomas Kerr, Esq.
201 Wood St. 15222

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**Order Amending Judgment**

AND NOW, to wit, December 26, 1972, IT IS ORDERED that the judgment heretofore entered on May 30, 1972, be amended as follows:

The last paragraph of the order directing entry of judgment on the special verdict for the plaintiffs in this case entered May 27, 1972, shall be modified to read as follows:

> "And the jury having returned a verdict for plaintiffs by reason of violations of the antitrust laws of the United States in the sum of $1,750,000, it is therefore ordered that judgment of threefold said amount, to wit: in the sum of $5,250,000, be and it is hereby entered in favor of 22 Ford, Inc., plaintiff and against Ford Motor Co., defendant . . ."

IT IS FURTHER ORDERED that judgment be entered in favor of the defendant with respect to the third cause of action set forth in the complaint.

IT IS FURTHER ORDERED that judgment be entered in favor of the defendant with respect to the sixth cause

of action set forth in the complaint insofar as violation of Section 3 of the Clayton Act and the Sherman Act are alleged.

In all other respects, the order of May 27, 1972, entered May 30, 1972, is confirmed.

WILLIAM W. KNOX,
United States District Judge.

CC:

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800 Porter Bldg. 15219

**Robert Wayman, Esq.**
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**Appendix I**

SPECIAL VERDICT

In accordance with instructions of the court, the jury hereby finds as follows:

(1) Was there a binding contract between plaintiff, Edward C. Rea, and defendant, Ford Motor Company, whereby Rea would acquire the title to so-called Balison tract of land in Monroeville, Allegheny County, Pennsylvania?

ANSWER: "YES"

(2) If your answer to the first question is "yes", what were the terms of the contract?

(a) that Rea was to take title in his own name or in the name of a corporation formed by him and lease the same to defendant, Ford Motor Company, for a term of years with a lease-back from Ford Motor Company to 22 Ford, Inc., Rea's Dealership? (The so-called *direct-lease plan*)

ANSWER: "YES"

(3) Do you find that the defendant, Ford Motor Company, breached its agreement as found by you in your answers to Questions 1 and 2?

ANSWER: "YES"

(4) If your answer to Number 3 is "yes", what amount of damages do you award Edward C. Rea for such breach of contract?

ANSWER: "$29,683.00"

(5) Did the defendant breach its duty to act in good faith in performance or in complying with any of the terms of the franchise or sales agreement between 22 Ford, Inc. and Ford Motor Company as required by the Automobile Dealers Act?

ANSWER: "YES"

If your answer is "yes", what amount of damages do you award plaintiff, 22 Ford, Inc., for this breach of duty?

ANSWER: "$350,000.00"

(6) Did defendant enter into any contract, combination or conspiracy which was in effect during the period since

February 11, 1964, and which unreasonably restrained interstate trade or commerce in Ford motor vehicles at the retail level in the area covered by the Pittsburgh Sales Office of Ford Motor Company?

ANSWER: "YES"

(7) Did the defendant during the period from February 11, 1964, attempt to monopolize interstate trade or commerce in Ford motor vehicles at the retail level in the area covered by the Pittsburgh Sales Office of Ford Motor Company?

ANSWER: "YES"

(8) Did the defendant violate Section 3 of the Clayton Act making it unlawful to make a sale or contract for sale of goods or commodities on condition that the purchaser shall not use or deal in goods and commodities of a competitor, viz: Oldsmobile automobiles manufactured by General Motors Corporation where the effect was substantially to lessen competition or tend to create a monopoly in any line of commerce?

ANSWER: "NO"

(9) If your answer to either 6, 7 or 8 or any of them is "Yes" what damages did plaintiffs sustain by reason of any such violation of the antitrust laws?

ANSWER: $1,750,000.00"

(Signed by the Jury)

May 25, 1972.

## Appendix II

Automobile Dealers Franchise Act, 15 U.S.C. 1221, *et seq.*
Section 1221:

"(b) The term 'franchise' shall mean the written agreement or contract between any automobile manufacturer engaged in commerce and any automobile dealer which purports to fix the legal rights and liabilities of the parties to such agreement or contract.

(e) The term 'good faith' shall mean the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: *Provided,* that recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith. Aug. 8, 1956, c. 1038, Sec. 1, 70 Stat. 1125."

Section 1222:

"*Authorization of suits against manufacturers; amount of recovery; defenses*

An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after August 8,

1956 to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: *Provided,* that in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith. Aug. 8, 1956, c. 1038, Sec. 2, 70 Stat. 1125."

Section 1223:

"*Limitations*

Any action brought pursuant to this chapter shall be forever barred unless commenced within three years after the cause of action shall have accrued. Aug. 8, 1956, c. 1038, Sec. 3, 70 Stat. 1125."

**Order Further Amending Judgment Following Filing of Remittitur**

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

---

EDWARD C. REA and 22 FORD, INC.,

v.

FORD MOTOR COMPANY.

---

Civil Action No. 67-286.

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AND NOW, to wit, January 16, 1973, plaintiffs having filed a remittitur pursuant to order of court entered December 26, 1972, remitting all actual damages for violation of the antitrust laws in excess of $1,000,000 and having agreed that judgment for treble damages would accordingly be amended and reduced to the amount of $3,000,000 plus costs of suit and attorney's fees,

IT IS ORDERED that judgment on special verdict in favor of plaintiffs as heretofore entered May 27, 1972, as amended by order of December 26, 1972, be further modified to read as follows:

> "and the jury having returned a verdict for plaintiffs by reason of violations of the antitrust laws of the United States in the sum of $1,750,000 which has been reduced to $1,000,000 by remittitur filed by the plaintiffs with this court on January 12, 1973, pursuant to order of this court entered December 26, 1972.

*Order Further Amending Judgment Following Filing of Remittitur*

IT IS THEREFORE ORDERED that judgment of threefold said amount, to wit: the sum of $3,000,000 be and the same hereby is entered in favor of the plaintiff 22 Ford, Inc. and against defendant and costs of suit including reasonable attorney's fees, said attorney's fees to be fixed by this court upon notice to the parties at a hearing thereon."

WILLIAM W. KNOX,
*United States District Judge.*

CC:

Robert Wayman, Esq.,
Frick Bldg. 15219.

Robert Jarvis, Esq.,
Porter Bldg. 15219.

John Morgan, Esq.,
Porter Bldg. 15219.

**Opinion of the Court**

(Filed Apr. 26, 1974.)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1190

EDWARD C. REA and 22 FORD, INC., a corporation,
v.
FORD MOTOR COMPANY, a corporation,
*Appellant.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D. C. CIVIL No. 67-286.)

Argued January 7, 1974.

Before VAN DUSEN, HUNTER and WEIS,
*Circuit Judges.*

Frank L. Seamans, Esq., John H. Morgan, Esq., Edward G. O'Connor, Esq. & David E. Tungate, Esq., of Eckert, Seamans, Cherin & Mellott, Pittsburgh, Pa.

and

Hugh B. Cox, Esq., Edwin M. Zimmerman, Esq. and James R. Atwood, Esq., of Covington & Burling, Washington, D. C., Counsel for Appellant.

Thomas M. Kerr, Esq., Pittsburgh, Pa.

and

Robert A. Jarvis, Esq., Raymond W. Cromer, Esq., Eugene J. Reinbold, Esq., of Beck, McGinnis & Jarvis, Pittsburgh, Pa.

and

Robert E. Wayman, Esq., Wayman, Irvin, Trushel & McAuley, Pittsburgh, Pa., Counsel for Appellees.

John A. Metz, Jr., Esq. & H. G. Beamer, III, Esq., of Metz, Cook, Hanna & Kelly, Pittsburgh, Pa., Counsel for Ford Dealers Alliance, Inc., *Amicus Curiae.*

VAN DUSEN, *Circuit Judge.*

This is an appeal from a judgment of the United States District Court for the Western District of Pennsylvania. The judgment required Ford Motor Company ("Ford") to pay damages to 22 Ford Inc. ("22 Ford"), a corporate franchised Ford dealer, in the amount of $3,350,000. for injuries claimed to have been caused by violation of the Sherman Act, 15 U. S. C. §§ 1 and 2, and the Automobile Dealers' Day in Court Act, 15 U. S. C. § 1221 *et seq.*, and to pay damages to Edward C. Rea ("Rea"), the principal stockholder of 22 Ford, in the amount of $29,683. for breach of an oral contract to convey real estate.

Ford is the second largest manufacturer of automobiles in the United States. It manufactures approximately 25% of the automobiles sold in this country, a market share that has not changed significantly during the period relevant here. With one exception—sales to the United States Government—Ford sell no automobiles directly to ultimate customers but, rather, sells to franchised retail dealers who then resell the automobiles to the public. At the time of trial, approximately 97% of these retail outlets were independently owned and financed. A relatively small number of the remaining 3% of the retail outlets were wholly-owned subsidiaries of Ford.[1] The remainder were "dealer development" outlets in which Ford and private parties share the investment, and which are established

[1] At the time of trial, only 13 of the 6000 Ford outlets in the United States were company owned.

in the expectation that the private participant will acquire full ownership of the outlet out of his share of its profits.[2] 22 Ford holds a Ford franchise in Monroeville, Pennsylvania, a suburb of Pittsburgh, which was originally given in February 1964 to Edward C. Rea, Inc. Thereafter the franchise was assigned to 22 Ford with Ford's permission.

The complaint in this case originally alleged seven causes of action. Prior to the trial, the district court granted Ford's motion for summary judgment on the causes of action that sought specific performance of the contract to convey real estate and to establish a lien on the real property involved. See *Rea v. Ford Motor Co.*, 326 F. Supp. 627 (W. D. Pa. 1971), *appeal dismissed* (3d Cir. Nos. 71-1780/1, 1972). At the conclusion of the evidence, the district court directed a verdict for Ford on the claims alleged under the Robinson-Patman Act, 15 U. S. C. § 13(d) and (e).[3] The court denied defendant's motion for a directed verdict on the four remaining causes of action and submitted them to the jury with instructions to return a special verdict in the form of answers to nine questions (see Appendix to this opinion). In response to the court's questions, the jury in substance found: (1) that there was a binding oral contract between Rea and Ford for the transfer of real estate, that Ford had breached the contract, and that Rea had thereby been damaged in the amount of $29,683.; (2) that Ford had violated the Automobile Dealers Act and that 22 Ford had thereby been damaged in the amount of $350,000.; (3) that Ford had engaged in

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[2] In the relevant period, the number of Ford dealer development stores in the United States has ranged between 100 and 170.

[3] Those claims were embodied in a separate cause of action and were also urged by plaintiffs in support of their cause of action under the Sherman Act.

a combination or conspiracy which unreasonably restrained interstate trade in Ford motor vehicles at the retail level in the area covered by the Pittsburgh Sales Office of Ford and had attempted to monopolize such trade, and that plaintiffs had thereby suffered damage in the amount of $1,750,000.; and (4) that Ford had not violated Section 3 of the Clayton Act, 15 U. S. C. § 14, making it unlawful to make a sale or contract for sale of goods on condition that the purchaser shall not use or deal in goods of a competitor, where the effect is substantially to lessen competition or tend to create a monopoly in any line of commerce.

The district court denied Ford's post-trial motions for a directed verdict, or in the alternative, for a new trial, but held that the damages fixed by the jury were excessive and that a motion for a new trial would be granted unless 22 Ford filed a remittitur for all single damages in excess of $1,000,000. *Rea v. Ford Motor Co.*, 355 F. Supp. 842 (W. D. Pa. 1973). The plaintiffs filed such remittitur and the district court amended its judgment accordingly. This appeal by Ford involves the three causes of action upon which the district court entered judgment for plaintiffs: the oral contract for the conveyance of real estate, the Automobile Dealers' Act, and the Sherman Act. We shall consider each *seriatim*.

I. *Oral Contract For Conveyance of Real Estate*

In response to special interrogatories, the jury found that Ford had orally agreed to sell Rea the real estate in Monroeville upon which 22 Ford and its predecessor have conducted a Ford dealership since December 1964, that Ford failed to perform this contract, and that, as a result, Rea had been damaged in the amount of $29,683., this

figure representing the cost to 22 Ford of acquiring and installing trade fixtures in the building used for the dealership. The jury found that there existed a binding oral contract between Rea and Ford, which was then owner of the land, under which Rea was to take title to the land (in his own name or in the name of a corporation formed by him) to lease the land to Ford, with a lease-back from Ford to 22 Ford, and that Ford breached such contract by failing to convey title to Rea. The jury therefore awarded to Rea as damages the cost of the improvements that he had to make in order to get the dealership service facility operating.[4] Although there is sufficient evidence to support the jury's finding of Ford's breach of contract, Rea is not entitled to maintain suit at this time. Under Pennsylvania law, a person who enters and makes permanent improvements on the land of another in reliance on an oral contract for the sale of the land cannot recover for their value so long as he remains in uninterrupted enjoyment of the improvements. *Naftzinger v. Roth*, 93 Pa. 443 (1880).[4a] It is true that Rea, unlike the plaintiff in *Naft-*

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[4] Under Pennsylvania law, which the parties have agreed covers this claim, damages for breach of a parol contract for the sale of land are limited to the expenses incurred on the faith of the contract. *Polka v. May*, 383 Pa. 80, 84, 118 A. 2d 154, 156 (1955); *Rineer v. Collins*, 156 Pa. 342, 27 A. 28 (1893). In its post-trial motions, Ford contended that Rea was not entitled to recover damages since it was 22 Ford that paid for the improvements, but the district court held that the source of the money did not prevent Rea's recovery. *Rea v. Ford Motor Co.*, 355 F. Supp. at 856-57.

[4a] There is nothing in the language of *Naftzinger* limiting the holding to the case of a tenant. The rationale of that decision, rather, was that the plaintiff (Roth) was enjoying the use of the land and improvements and therefore had not yet suffered any loss under the terms of the contract, which provided that Roth should move on the property, build himself a house, barn and blacksmith shop, pay rent as long as Naftzinger lived, and receive the property when Naftzinger died.

*zinger,* is not legally entitled to possession of the land and improvements, for the present lessee is not Rea but 22 Ford. However, it is not necessary to "pierce the corporate veil" in order to apply the holding of *Naftzinger* to this case. Rea's contract with Ford, as found by the jury, specifically provided for an eventual lease-back to 22 Ford, and 22 Ford, as lessee, has had the full use and benefit of the equipment and improvements since 1964, has amortized the costs of the equipment, and has taken corresponding deductions on its income tax returns. Moreover, since it appears from the testimony that the value of the improvements was not included in the rental charge by Ford, there has not yet been any loss suffered by 22 Ford, and future losses, if any, are entirely speculative at this time.[5] Therefore, we conclude that Rea, "being in the enjoyment of all that came within the contract, as he stated it," *Naftzinger v. Roth,* 93 Pa. at 448, is not entitled to maintain suit as long as 22 Ford continues in possession and enjoyment of the improvements.[6] Thus that part of the district court's judgment awarding damages to Rea for violation of the oral argument will be set aside.

II. *Automobile Dealers' Day In Court Act Claim*

In its pleadings and pre-trial statement, 22 Ford originally alleged that Ford had violated the Automobile

[5] Such future losses are claimed to be the value of improvements placed on the land by plaintiffs. Conceivably 22 Ford could remain on the property until the improvements had been totally worn out and would, therefore, never suffer any loss.

[6] When the lease expires or 22 Ford otherwise is ejected from or leaves the premises, there may at that time be recovery of damages for the unamortized value, if any, of the equipment and improvements. See *Walter v. Transue,* 17 Pa. Super. 94, 100 (1901).

Dealers' Day in Court Act ("Automobile Dealers' Act") by refusing to enter into a particular real estate transaction with Rea and by competing with 22 Ford through company-owned dealerships. The district court directed a verdict for Ford on these claims at the close of plaintiffs' case. At the same time, however, the court suggested *sua sponte* a new and different claim under the Automobile Dealers' Act which 22 Ford thereafter embraced. The gist of that new claim was that sometime between February and August 1964 Ford violated the Act by threatening to cease shipping Ford cars to 22 Ford's predecessor as a Ford dealer in Monroeville, unless a separate corporation, in which Rea was the principal stockholder, resigned its franchise as an Oldsmobile dealer in a neighboring town.[7] The evidence underlying that claim is as follows:

Edward C. Rea, Inc. was given a franchise as a Ford dealer in Monroeville in February 1964. The Ford Sales Agreement which established the terms and conditions of that franchise provides that "the Dealer reserves the right to make purchases from others without obligation or liability of any kind to the Company, provided that the Dealer shall not be relieved of any duty, obligation, or responsibility assumed by the Dealer under this agreement . . . ." At that time Rea was the principal stockholder in another company, then known as Rea Oldsmobile, Inc. ("Rea Olds"), which conducted an Oldsmobile dealership in Wilkinsburg.

[7] Plaintiffs originally claimed that Ford had violated Section 3 of the Clayton Act by requiring 22 Ford not to deal in the goods of a competitor, and testimony about the alleged threat was introduced on that theory. In its instructions on the claim under Section 3, the court stated that it did not believe there was any evidence that the alleged conduct of Ford had adversely affected competition, and the jury returned a verdict for Ford on this claim.

During the negotiations for the granting of the Ford franchise to Edward C. Rea, Inc., Rea represented to Ford that he would acquire the capital necessary for the operation of the Ford franchise at Monroeville by liquidating the assets of Rea Olds, and Ford required Rea to sign a letter stating his intention to give up the Oldsmobile dealership and to send a letter to Oldsmobile stating his intent to resign.

For a time in 1964 Edward C. Rea, Inc. operated in a temporary facility because a new Ford facility, whose preparation and use required a substantial amount of capital, was not yet available. Sometime between February and August 1964, before the new facility was available, Rea suggested to McClanathan, then district manager for Ford, that Rea Olds might not liquidate its operation. Rea testified that in response McClanathan threatened to stop shipping Ford automobiles to the Monroeville dealership unless Rea Olds resigned its Oldsmobile franchise. McClanathan denied making the alleged threat to withhold cars, but he did testify that he told Rea that he thought the Oldsmobile dealership should be liquidated in order to assure an adequate source of capital for the conduct of the Ford dealership in the new Monroeville facility. Thereafter Rea Olds resigned the Oldsmobile franchise, retained part of its assets, and sold the remainder to another corporation. Sometime after August 31, 1964, Rea Olds changed its name to 22 Ford, Inc., the present plaintiff, and took over operation of the Ford Monroeville dealership in its new facility. The Ford franchise agreement at Monroeville was assigned to 22 Ford on March 9, 1966, by Edward C. Rea, Inc., which was then dissolved. This assignment was accepted and consented to by Ford on April 21, 1966.

On the basis of this evidence, the jury found that Ford breached its duty "to act in good faith in performing or in complying with any of the terms or provisions of the franchise," as required by Section 2 of the Automobile Dealers' Act, 15 U. S. C. § 1222, and awarded to 22 Ford damages in the amount of $350,000., representing an estimate of the profits that Rea Olds would have made if it had continued to operate the Oldsmobile franchise.

After careful consideration and recognizing the record on the issue of liability presents a close case, we have concluded that defendant is not entitled to either the entry of judgment in its favor or a new trial to determine the question of liability on this claim. Ford challenges the jury's finding that it violated the Automobile Dealers' Act on several grounds.

First, Ford argues that since the protection of the Act is confined to the relations between the manufacturer and its dealer as supplier and distributor, respectively,[8] 22 Ford can recover only for damages sustained by it in its capacity as a Ford dealership as a result of Ford's failure to act in good faith with respect to the operations of that dealership. However, plaintiffs produced evidence to show that the coercive statements complained of here were intended

[8] The legislative history of the Act includes the following statements as to its purpose:

"It imposes upon the factory the affirmative obligation to act in 'good faith' in all dealings or transactions with its dealers." S. Rep. No. 2073, 84th Cong. 2d Sess. 4 (1956).

"These bills impose upon any automobile manufacturer granting a franchise to an automobile dealer the duty of acting in 'good faith' in his relationship with that dealer." Hearings on H. R. 11360 and S. 3879 Before the Anti-Trust Subcomm. of the House Comm. on the Judiciary, 84th Cong., 2d Sess. 3 (1956) (Introductory Remarks Congressman Celler).

to and did cause Rea Olds to surrender its Oldsmobile franchise, and the claimed damages are those suffered by Rea Olds by that surrender; there is no suggestion that Ford's threats were designed to control or coerce the conduct of Edward C. Rea, Inc., as a Ford dealer or that they resulted in any damage to the Monroeville Ford dealership. Furthermore, although Rea Olds, after surrendering its Oldsmobile franchise and liquidating its assets, changed its name to 22 Ford and succeeded to the Ford franchise of Edward C. Rea, Inc., those transactions cannot serve to give 22 Ford a cause of action for injuries predating its affiliation with Ford.[9] Thus, Ford concludes, there is no basis under the Automobile Dealers' Act for the jury's finding that it is liable to 22 Ford for a breach of its duty of good faith.

The district court held, in response to this argument, that this cause of action was included in the transfer of rights under the dealership agreement to 22 Ford in April 1966 and thus 22 Ford, as the successor to the rights of Edward C. Rea, Inc. under the franchise, was entitled to bring suit and recover damages. *Rea v. Ford Motor Co.*, 355 F. Supp. at 862-63. This analysis, however, does not entirely meet the objection raised by Ford, since it assumes one of the points in issue—whether Edward C. Rea, Inc. could recover for the damages suffered by Rea Olds. Nevertheless, we find Ford's argument on this point does not justify its contention that it is entitled to judgment on this claim, for it is based on too narrow and technical an interpretation of who the "dealer" is under the facts of

[9] "Unquestionably, the Act does not apply until a manufacturer-dealer relationship has been created." *Lewis v. Chrysler Motors Corp.*, 156 F. 2d 605, 606-07 (8th Cir. 1972). See also *Hanley v. Chrysler Motors Corp.*, 433 F. 2d 708, 710-11 (10th Cir. 1970).

this case. Edward C. Rea was not only a signing party to the franchise agreement between Ford and Edward C. Rea, Inc., but was made essential to the operation of the dealership by its terms, which recited that Ford had entered into the agreement "in reliance (i) upon the representation and agreement that . . . [Edward C. Rea] substantially participate(s) in the ownership of the Dealer . . . and (ii) upon the representation and agreement that . . . [Edward C. Rea] shall have full managerial authority for the operating management of the Dealer in the performance of this agreement." Rea, therefore, had a cause of action under the Automobile Dealers' Act against Ford for any bad faith in coercing him, as President and principal stockholder of Rea Olds, to surrender the Oldsmobile franchise and to recover damages suffered by Rea Olds as a result of such surrender. See *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, 447 F. 2d 786, 790-91 (5th Cir. 1971); *Kavanaugh v. Ford Motor Co.*, 353 F. 2d 710 (7th Cir. 1965).[10]

Second, Ford argues that even if 22 Ford's claim is a proper one under the Act, the record contains insufficient evidentiary support for the jury's finding of a violation. Ford accepts, as it must, the jury's finding, implicit in its verdict, that McClanathan, Ford's regional manager in the Pittsburgh area, made statements to Rea that could be

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[10] We note that Albert D. Rea, the minority stockholder in Edward C. Rea, Inc., although also made essential to the operation of that dealership by the terms of the franchise agreement, is not named as a party to this case. The district court on remand should determine whether Albert D. Rea should be joined as a party under F. R. Civ. P. 19-21 and whether the damages to which Edward C. Rea is entitled by virtue of his percentage of stock ownership should be diminished. See *Coman v. Coman*, —— F. 2d —— (3d Cir. No. 73-1569, Opinion of 2/21/74).

construed as a threat to terminate the shipment of cars to Edward C. Rea, Inc., unless Rea had Rea Olds surrender its Oldsmobile franchise. Nevertheless, Ford contends that such a threat does not constitute a breach of its duty to act in good faith since its purpose was to force Rea to honor his earlier representations to Ford that he would obtain a substantial part of the capital required for the operation of the new Ford outlet by liquidating the assets of Rea Olds, and thereby to protect Ford's lawful interest in the capital requirements of Edward C. Rea, Inc.[11]

As defined by the Automobile Dealers' Act, the term "good faith" means

> ". . . the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: *Provided*, That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith."

15 U. S. C. § 1221(e). In applying this definition, it is necessary for the finder of fact to consider not only whether one party brought pressure to bear on the other, but for what reason it did so. See *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp., supra* at 791. As the district court correctly instructed the jury in this case, relying on *Berry Brothers Buick, Inc. v. General Motors Corp.*, 257 F. Supp. 542, 546 (E. D. Pa. 1966), *aff'd*, 377 F. 2d 552

[11] Ford points out that the franchise contract required Edward C. Rea, Inc. to maintain at all times and employ in its business such working capital as was required to enable it fully to carry out its obligations and responsibilities under the agreement.

(3d Cir. 1967) (*per curiam*), a violation of this Act results if there is "a wrongful demand made which will result in sanctions if not complied with" (1523a).

A manufacturer does not breach its duty to act in good faith by terminating a franchise when a dealer has failed to fulfill a reasonable obligation or agreement made in connection with the operation of the dealership. See, *e.g.*, *Garvin v. American Motors Sales Corp.*, 318 F. 2d 518 (3d Cir. 1963); *Milos v. Ford Motor Co.*, 317 F. 2d 712 (3d Cir.), *cert. denied*, 375 U. S. 896 (1963). And among those agreements which a manufacturer may in good faith require that a dealer carry out is the obligation to abide by reasonable net capital guidelines. See *Globe Motors, Inc. v. Studebaker-Packard Corp.*, 328 F. 2d 645 (3d Cir. 1964).

However, whether a manufacturer has acted with sufficient justification to constitute good faith in bringing pressure to bear on a dealer is a factual question the determination of which will depend on the circumstances arising in each particular case.[12] As the court stated in *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, *supra* at 791, assuming there is evidence supporting a finding of a lack of good faith, "it is up to the jury to determine the redemption value of the facts indicating that the action could have been taken in good faith." We hold that the evidence in this case, as viewed most favorably to the plaintiffs, is sufficient to support the jury's finding that Ford breached its duty to act in good faith by threatening

[12] In *Globe Motors, Inc. v. Studebaker-Packard Corp.*, *supra*, the dealer challenged the good faith of the imposition of the financial requirements and the insistence by the manufacturer that they be met; hence, there was never any question as to whether or not the manufacturer's actions were motivated by a desire to protect his legitimate interest in the capital condition of the dealer.

to stop supplying cars to Edward C. Rea, Inc., unless Rea Olds resigned its Oldsmobile franchise. See *Rea v. Ford Motor Co.*, 355 F. Supp. at 857-61. The effect of that threat was to violate the dealer's right to purchase cars from other manufacturers, which right was not only guaranteed by the franchise agreement but apparently also of particular concern to Congress when it enacted the law.[13] While there was also testimony that Ford's motive was to assure that its dealer met its capital guidelines by carrying out what it had earlier represented it would do, the credibility and weight to be given to that testimony in determining the issue of good faith were properly left to the jury.

Third, Ford argues that 22 Ford is not entitled to maintain this cause of action under the Act, since it did not give notice to the Chairman of the Company's Dealer Policy Board of the statements of McClanathan as required by the provision of the franchise agreement which sets up procedures for review of allegedly unfair actions by Ford or its representatives.[14] The district court found that

[13] "The existence of coercion or intimidation depends upon the circumstances arising in each particular case and may be inferred from a course of conduct. For example, manufacturer pressure, direct or indirect, upon a dealer to accept automobiles, parts, accessories, or supplies which the dealer does not need, want, or feel the market is able to absorb, may in appropriate instances constitute coercion or intimidation. Similarly coercion or intimidation may be found where the manufacturer attempts to require the dealer to handle exclusively, or sell a specified quota of parts, accessories, and tools made or approved by the manufacturer." H. Rep. No. 2850, 84th Cong., 2d Sess. (1956), quoted at 3 U. S. Code Cong. & Admin. News 4603 (1956).

[14] Paragraph 2(g) of the franchise contract provides:

"In the interests of maintaining harmonious relationships between the parties to this agreement, the Dealer shall report

(Footnote continued on following page)

there is nothing in that provision which requires a dealer to submit disputes to the Dealer Policy Board as a prerequisite to bringing suit in court for violation of the Act. *Rea v. Ford Motor Co., supra* at 862. We need not decide this issue on this record, since defendant does not appear to have raised this defense prior to the return of the jury verdict. However, in light of the Act's purpose,[15] it may be that a dealer should not be denied the opportunity to pursue his statutory cause of action because of a failure to invoke a contractual grievance procedure. See *Blenke Brothers Co. v. Ford Motor Co.*, 217 F. Supp. 459, 464 (N. D. Ind. 1963).

Finally, Ford argues that the introduction of a new theory of liability at the close of the plaintiffs' case prejudiced Ford in its defense to the Dealers' Act claim. In particular, Ford points out that the question of whether

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(Footnote continued from preceding page)

promptly in writing to the Chairman of the Company's Dealer Policy Board, or to such other person as may be designated by the Executive Committee of the Company from time to time, any act or failure to act on the part of the Company or any of its representatives, which the Dealer deems not to have been, or that the Dealer proposes to use in support of a claim that the Company has not acted, in good faith as to the Dealer. For the purposes of this subparagraph 2(g), the term 'good faith' shall mean the Company and its representatives acting in a fair and equitable manner toward the Dealer so as to guarantee the Dealer freedom from coercion, intimidation, or threats of coercion or intimidation from the company."

[15] The statute has as its purpose to create "a cause of action where none previously existed in that, *irrespective of contractual provisions*, it grants a right of review in the Federal courts of disputes between automobile manufacturers and their dealers involving the good faith of the manufacturer in complying with, in terminating, or in not renewing franchises." (Emphasis supplied.) H. Rep. No. 2850, 84th Cong., 2d Sess. (1956) quoted at 3 U. S. Code Cong. & Admin. News 4596 (1956). See also *Barney Motors Sales v. Cal Sales, Inc.*, 178 F. Supp. 172 (S. D. Cal. 1959).

Edward C. Rea, Inc. would have had adequate capital to carry on the Ford franchise absent the liquidation of Rea Olds did not become relevant until that time.[16] Thus, Ford contends, since it did not receive any pre-trial notice that this would be a decisive issue in the case, it was denied a fair opportunity to prepare and present a full showing that the liquidation of Rea Olds was necessary to provide Edward C. Rea, Inc., with sufficient capital to discharge its obligations as a Ford dealer.

After an examination of the record, we cannot say that it was an abuse of discretion for the district court to submit this claim to the jury in spite of the failure of plaintiffs to allege it prior to trial, or, in fact, until the end of their case, when it was suggested by the trial judge. See *Rea v. Ford Motor Co., supra,* at 861-62. Ford had the opportunity to, and did in fact, introduce evidence tending to demonstrate that Ford reasonably believed that the assets of Rea Olds were Rea's sole source of capital for the operation of the Ford dealership.[17] It is possible that with more advance notice, Ford could have adduced further evidence to establish with greater certainty the objective necessity for Rea Olds' liquidation of its franchise.[18] How-

[16] The pre-trial proceedings, including discovery, and a large part of the trial were conducted on the assumption that McClanathan's threats were relevant only to the claim under Section 3 of the Clayton Act. Ford's principal defense to that claim was that there had been no substantial lessening of competition, a defense which was ultimately accepted, but which was of no relevance under the Dealers' Act.

[17] McClanathan and a second Ford representative testified that Rea had never indicated to them that he had any source of capital to invest in a Ford dealership except the assets of Rea Olds.

[18] For example, Ford might have been able to find evidence to rebut Rea's testimony that he believed that if Rea Olds was not liquidated, he could have borrowed the required capital from a friend, Mr. Aiken, or from two banks.

ever, the issue before the jury was Ford's *good faith* in pressuring Rea to surrender the Oldsmobile franchise.

While we thus conclude that the jury's finding that Ford violated the Automobile Dealers' Act should be sustained, we hold that its award of damages thereunder is excessive and must be set aside. The jury's award of $350,000. apparently represents a straight-line projection of Rea Olds' estimated profits over the period from its termination of the GM franchise in September 1964 to the time of trial in May 1972, based upon a formula devised by Dr. Staelin, 22 Ford's expert. It has been held that an automobile dealer may recover damages for the loss of future profits resulting from the manufacturer's wrongful conduct under the franchise agreement. See *American Motors Corp. v. Semke*, 384 F. 2d 192, 199-200 (10th Cir. 1967). However, the jury's award here failed to reflect the fact that in 1964 Rea Olds sold certain of its assets for $60,000. and that this cash and the remaining assets of the company were thereafter devoted to the operation of the Monroeville Ford franchise.[19] To award 22 Ford recovery of anticipated profits from the Oldsmobile franchise without any deduction for the asset sale or for the fact that it benefited by having the retained cash and assets available for the operation of the new Ford franchise is to permit a double recovery. *Cf. Gustafson v. General Motors Acceptance Corp.*, 470 F. 2d 1057, 1061 (8th Cir. 1973). The award of dam-

[19] The trial judge instructed the jury either to adopt or reject, in whole or in part, Dr. Staelin's estimate of the profits the Oldsmobile dealership would have earned from September 1, 1964, to the date of trial (1526a). That estimate was a projection based on past profits of the Oldsmobile franchise. Thus, neither the trial judge's instructions on damages nor Dr. Staelin's estimate made mention of or took into account the benefit 22 Ford received from the cash and retained assets.

ages in favor of plaintiffs for defendant's violation of the Dealers' Act will, therefore, be vacated and the case remanded for a redetermination of such damages in light of this opinion.

## III. *Sherman Act Claims*

As alleged in its complaint and developed at trial, 22 Ford's claims under the Sherman Act, 15 U. S. C. §§ 1 and 2, rested primarily on the charge that Ford had violated Sections 1 and 2 of the Act by its operation of company-owned and dealer development outlets in the Pittsburgh area. In its pre-trial statement, 22 Ford added an additional claim that by reason of certain arrangements with nationwide car rental companies, such as Hertz and Avis, Ford had engaged in unlawful price fixing. The jury's award of damages to 22 Ford under the Sherman Act apparently rested for the most part on the claim relating to the operation of the company-owned outlets.[20]

### 1. *The Claim Based On Ford's Operation of Company-Owned Outlets*

22 Ford claimed that in the Pittsburgh area Ford pursued a plan to operate its company-owned and dealer development stores in such a way as to impose an unreasonable restraint on interstate trade and for the purpose of driving independently owned Ford dealers out of the

[20] In its special verdict, the jury did not award separate damages for each violation of the antitrust laws. However, in its opinion denying Ford's post-trial motions, the district court took the view that the price-fixing charge accounted for only $34,200, of the $1,750,000, single damage award by the jury under the Sherman Act. Accordingly, in its opinion on defendant's post-trial motions and remittitur reducing all antitrust single damages to $1,000,000., the court attributed $34,200, in damages to the price-fixing charge.

business of selling Ford automobiles. Although 22 Ford asserted that this plan was nationwide in scope, its evidence was directed primarily to Ford's operation of Triangle Motors ("Triangle"), a company-owned Ford dealership located in the East Liberty section of Pittsburgh.[21]

Triangle became a Ford-owned dealership in March 1961 when its independent operator fell into financial difficulty. It is undisputed that the dealership made rather modest profits in 1961, 1962, 1964 and 1968 and had losses, occasionally heavy losses, in other years until its closing in May 1969,[22] and that Triangle received from Ford substantial capital contributions, as well as loans which were largely repaid.

In addition, Bernard Schroll, who had been president and manager of Triangle from 1962 to 1967, testified that local Ford employees persuaded him to make expenditures for advertising and sales personnel which in his opinion were excessive,[23] and to sell as many cars as possible without regard to the dealership's profitability. Schroll also related several statements made to him by various Ford

[21] Triangle was the only company-owned outlet selling Ford automobiles in the Pittsburgh sales district, except for a period of several months when there was one other company store. Ford also operated up to three company-owned Lincoln-Mercury outlets in Allegheny County, and their financial records were placed in evidence. Allegheny Ford Truck Sales, Inc. is also wholly owned by Ford, but it sells no Ford passenger automobiles.

[22] The profits averaged about $22,000., with a high of approximately $35,000. and a low of approximately $15,000. The losses averaged $63,000., with a high of $112,000. and a low of $10,000.

[23] Rea also testified that he thought Triangle's advertising was in excess of what he could afford as a privately financed dealer, but no records of 22 Ford were introduced to compare the advertising expenditures of the two dealerships.

representatives purporting to show that Ford was prompted by a specific intent to drive independent Ford dealers like 22 Ford out of business and to monopolize the retail distribution of Ford cars.[24]

Finally, 22 Ford relied upon the opinion testimony of Richard Staelin, an assistant professor of marketing at Carnegie-Mellon University, to support its antitrust claims. Through the use of tables, Dr. Staelin showed that Triangle and other selected Ford and Lincoln-Mercury outlets operated at a loss in some years and attributed such losses to expenditures on "market variables" like advertising, rent, and sales personnel. On the basis of a theoretical mathematical model, Dr. Staelin concluded that it would be to Ford's economic advantage to operate company outlets at a loss because it could thereby increase its manufacturing profit by diverting sales from its competitors, such as General Motors and Chrysler. He therefore characterized those losses as a "subsidy" or "discount" given by Ford to its company-owned outlets. Dr. Staelin postulated that while such a policy would increase Ford's manufacturing profits by diverting sales from its competitors, it would also divert some sales from independent Ford dealers. However, he did not offer any evidence that in fact the operations of Triangle or other Ford company-owned stores had diverted any sales from Ford independent dealers and took the position that the effect of those operations on 22 Ford was not relevant to his testimony.

[24] This testimony appears at pp. 539a-44a of the record. Ford argues that it is implausible to suppose that it intended to drive out of business its independent dealers in view of its reliance on them for the distribution of nearly all of the automobiles it manufactures and that the alleged statements by Ford executives must be interpreted as meaning that Ford intended to achieve market dominance over competing manufacturers.

Dr. Staelin proceeded to estimate the damages on 22 Ford's antitrust claim by computing the average loss-per-car suffered by those company-owned Ford and Lincoln-Mercury outlets whose financial records he had used as the basis of his model. Dr. Staelin reasoned that 22 Ford was entitled to receive from Ford the same amount of "subsidy" for each car it had sold. Accordingly, he multiplied the average annual loss-per-car of the Ford-owned outlets times the annual sales of 22 Ford. Apparently based on these calculations, the jury awarded $1.75 million in single damages on 22 Ford's antitrust claims, which the district court remitted to just under $1 million because of its views that Dr. Staelin had made an erroneous assumption in his calculations.

Ford has advanced a number of arguments why the verdict against it on this claim is erroneous and should be set aside. However, it is necessary for us to consider only one which we find meritorious and dispositive of this claim. It is well established that a person seeking to recover treble damages under Section 4 of the Clayton Act, 15 U. S. C. § 15, cannot prevail merely by proof that the defendant has violated the antitrust laws. In addition, he must prove that the violation was a material cause of some injury to his business or property. See *Deaktor v. Fox Grocery Co.*, 475 F. 2d 1112, 1115 (3d Cir. 1973); *Freedman v. Philadelphia Terminals Auction Co.*, 301 F. 2d 830, 833 (3d Cir.), *cert. denied*, 371 U. S. 829 (1962).[25] This

[25] *Accord, Haverhill Gazette Co. v. Union Leader Corp.*, 333 F. 2d 798, 802 (1st Cir.), *cert. denied*, 379 U. S. 931 (1964); *Gottesman v. General Motors Corp.*, 414 F. 2d 956, 961 (2d Cir. 1969); *Martin v. Phillips Petroleum Co.*, 365 F. 2d 629, 632 (5th Cir. 1966); *Englander Motors, Inc. v. Ford Motor Co.*, 267 F. 2d 11, 15 (6th Cir.

(Footnote continued on following page)

principle is in no way qualified by the rule that once a plaintiff has shown that illegal conduct has caused some injury to his business or property, the trier of fact may make a reasonable estimate of damages, for a distinction must be made in claims under Section 4 of the Clayton Act between the fact of damages ("injury") and the amount of damages. See *Story Parchment Co. v. Paterson Co.*, 282 U. S. 555, 562 (1931); *Flintkote Co. v. Lysfjord*, *supra* at 392.

The record here provides no rational support for a determination, even by way of inference, that Ford's operation of its company stores caused any injury to the business or property of 22 Ford. There was no evidence that Triangle or any other Ford Company outlet engaged in predatory price cutting,[26] or that 22 Ford had been compelled to lower its prices because of such price cutting. Nor did 22 Ford attempt to prove that it had incurred greater operating expenses than it would have had to incur absent the operations of Triangle and other company outlets. There was no evidence that 22 Ford lost sales to Triangle because of the latter's prices, advertising, number of salesmen, or any other reason.[27] Finally, 22

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(Footnote continued from preceding page)

1959); *Bendix Corp. v. Balax, Inc.*, 471 F. 2d 149, 160 (7th Cir. 1972); *Duff v. Kansas City Star Co.*, 299 F. 2d 320, 332 (8th Cir. 1962); *Flintkote Co. v. Lysfjord*, 246 F. 2d 368, 392 (9th Cir. 1957); *Union Carbide & Carbon Corp., v. Nisley*, 300 F. 2d 561, 579 (10th Cir.)., *cert. dismissed*, 371 U. S. 801 (1962).

[26] Indeed, the evidence indicated that Triangle charged an average of $50. *more* per car than did 22 Ford.

[27] The evidence demonstrated that 22 Ford's percentage of sales in Pittsburgh's East Liberty area did not increase after Triangle and its successor went out of business. Such evidence tends to support the conclusion reached by a market analysis introduced by Ford that 22 Ford and Triangle serviced generally different market areas with only a limited number of overlapping potential customers.

Ford made no claim and presented no evidence that it had lost profits because of the operations of Triangle or other company outlets. Indeed, 22 Ford's counsel expressly disavowed any such claim:

> "What our position is in this case is what 22 Ford did or did not do is not relevant because we are not asserting in our case that 22 Ford sustained a loss of profits . . . [W]e haven't put any evidence in the record to indicate any particular loss sustained by 22 Ford." (1281a)

Instead of attempting to prove that Triangle's operations had been the cause of some injury to the business or property of 22 Ford, 22 Ford chose to rely on the testimony of Dr. Staelin which suggested that Ford had provided "subsidies" to its company outlets for the purpose of increasing Ford's share of the total automobile market and which assumed that 22 Ford was entitled to receive in damages a comparable subsidy. Dr. Staelin's theory, however ingenious, simply does not establish the fact of injury required to recover treble damages under the Clayton Act. Nor can the absence of evidence as to injury be remedied by the district court's observation that "[i]n this day of mobility, it is reasonable to expect that customers would travel from one Ford dealer to another in the Allegheny County area to select a new car, particularly where they might be attracted by massive advertising and aggressive tactics of numerous salesmen." While such a conclusion is reasonable, it is also entirely speculative and cannot support the necessary finding that 22 Ford sustained an injury to its business or property as required by Congress for recovery under § 4 of the Clayton Act.

We conclude that there is insufficient evidence in this case that Ford's operation of its company-owned outlets caused any economic injury to 22 Ford and therefore that 22 Ford was not entitled to an award of damages for its alleged violations of the Sherman Act.[28] This decision, however, in no way undermines the proposition that automobile manufacturers are subject to the strictures of the antitrust laws in the operation of their wholly-owned outlets, and where a violation of those laws causes injury to the business of a competitor, they will be liable for damages. See, for example, *Mt. Lebanon Motors, Inc. v. Chrysler Corp.*, 283 F. Supp. 453 (W. D. Pa. 1968).

2. *The Price-Fixing Claim*

22 Ford's claim for damages as a result of Ford's alleged violations of the Sherman Act also rested on the contention that Ford had conspired with Hertz and Avis to fix the price at which those rental companies would buy new cars from 22 Ford and other dealers. The evidence showed that for many years the two major car rental companies had bought new Fords, as well as cars of other makes,

[28] It would also appear that plaintiffs failed to establish a claim under Section 2 of the Sherman Act, since there was no evidence that Ford and its dealers were able to exclude actual or potential competition in the retail trade from the greater Pittsburgh market area and, therefore, had a dangerous probability of achieving monopolization in a relevant market. See *American Tobacco Co. v. United States*, 328 U. S. 781, 784-86, 809 (1946); *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F. 2d 203, 207 (5th Cir. 1969); *Bernard Food Industries, Inc. v. Dietene Co.*, 415 F. 2d 1279, 1284 (7th Cir. 1969), *cert. denied*, 397 U. S. 912 (1970); *Hiland Dairy, Inc. v. Kroger Co.*, 402 F. 2d 968, 971 (8th Cir. 1968), *cert. denied*, 395 U. S. 961 (1969). Furthermore, in view of this rule as to what constitutes an attempt to monopolize, it would appear to have been error for the district court to deny defendant's requests for charge Nos. 7 and 8.

from dealers at a fixed price of $50. over the manufacturer's invoice price to the dealer less 1%. Such price uniformity, especially if at an artificial level not related to the supply and demand of a given commodity, may be evidence from which an agreement or understanding, or some concerted action operating to restrain commerce, may be inferred. See *Triangle Conduit & Cable Co. v. Federal Trade Commission*, 168 F. 2d 175 (7th Cir. 1948), *aff'd sub nom. Clayton Mark & Co. v. Federal Trade Commission*, 336 U. S. 956 (1949). Furthermore, after a careful review of the record, we believe that there is sufficient evidence to support an inference that Ford was a party to an agreement or understanding to fix the price at which Ford dealers would sell to Hertz and Avis.[29] Although Ford did not require its dealers to sell cars to Hertz or Avis, its agreement to the formula price would tend to lend support to the demand of the car rental companies that dealers sell at that price and, therefore, constitutes a restraint of trade in violation of § 1 of the Sherman Act. However, we cannot be sure whether the jury's affirmative answer to question 6, finding a "contract, combination or conspiracy . . . which unreasonably restrained interstate trade or commerce in Ford motor vehicles at the retail level" (see Appendix to this opinion), was based on this price-fixing claim or on the claim arising out of the operation of company-owned outlets described above. For this reason, a new trial is required on this claim.

[29] In a memo to Avis whose purpose was "to confirm the basic procedures of our 1963 Summer Rental Promotion as outlined in discussions between the Ford Division Fleet Sales Department and Avis Rent-A-Car System, Inc.," Ford stated that "[w]e understand that the price you are willing to pay is the dealer's net cost plus one-half of the two per cent holdback plus an additional $50."

Because there will be a new trial on this claim, it is appropriate to comment on defendant's contention that there has been no proof of injury or amount of damages resulting from the alleged price-fixing agreement. On the issue of injury, 22 Ford again relied upon the opinion testimony of Dr. Staelin, who estimated that under competitive market conditions the price the auto rental companies would have had to pay per car was $76. higher than the formula price. Ford contends that this testimony fails to establish its alleged antitrust violation *caused* the alleged loss of revenue, see *Deaktor v. Fox Grocery Co.*, 475 F. 2d at 1115, arguing that it was necessary for 22 Ford to show that, absent the alleged price-fixing arrangements Avis and Hertz would have purchased new cars from 22 Ford at a higher price than the formula price. We find this to be an unduly restrictive view of causation under the facts of this case. The Supreme Court has held that a plaintiff's

> "burden of proving the fact of damages under § 4 of the Clayton Act is satisfied by its proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage. It is enough that the illegality is shown to be a material cause of the injury: a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4."

*Zenith Corp. v. Hazeltine*, 395 U. S. 100, 114 n. 9 (1969). The Court in *Zenith* went on to explain its view of causation as follows:

> "The Court has repeatedly held that in the absence of more precise proof, the factfinder may 'conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs.' *Bigelow v. RKO Pictures, Inc., supra* [327 U. S. 251 (1946)] at 264. See also *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359, 377-79 (1927); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555, 561-66 (1931)."

*Id.* at 123-24. There is sufficient evidence that the price-fixing agreement between Ford, Hertz and Avis would tend to injure plaintiff's business and that the formula price was lower than the free market price would be.[30] Moreover, Dr. Staelin testified that he could not conclude that the formula price was entirely the result of the buying power of the rental companies, but rather that it seemed to him that the way Ford dealt with Hertz and Avis contributed to the absence of a competitive market (922a). Although there is also some evidence in the record that Hertz and Avis possessed sufficient market power to impose the formula price on retail dealers even without the

[30] Since the market in new Ford cars was not competitive, both because of the price-fixing agreement with Ford and the buying power of Hertz and Avis, it would be inappropriate to require 22 Ford to show that it could have sold cars to Hertz and Avis at a higher price than the formula price. Ford's reliance on *Gottesman v. General Motors Corp.*, 310 F. Supp. 1257, 1260 (S. D. N. Y. 1970), *aff'd on other grounds*, 436 F. 2d 1205 (2d Cir.), *cert. denied*, 403 U. S. 911 (1971), is therefore misplaced.

agreement of Ford,[31] we do not believe that it was of such weight as to have required a jury finding that the price-fixing agreement was not a material cause of 22 Ford's injury.

We therefore conclude that there is sufficient evidence from which a fact finder could find that 22 Ford was injured in its business as a result of Ford's price-fixing agreement with Hertz and Avis and is entitled to recover treble damages under § 4 of the Clayton Act. As to defendant's contentions concerning proof of damages,[32] we need only note that the Supreme Court of the United States has held that in cases where a wrongful act precludes

> "ascertainment of damages more precisely, by comparison of profits, prices and values as affected by the con-

[31] The evidence indicates that Hertz and Avis have been able to establish and maintain the formula price for many years, not only for new Fords but also for new cars of other manufacturers, and that this practice of formula pricing goes back to before the date of any of the specific transactions or documents upon which 22 Ford relied to establish the price-fixing arrangement. The evidence also shows that 22 Ford was only one of numerous outlets from which Hertz and Avis could have purchased new Fords and that when those rental companies were unable to obtain cars at the formula price from one Ford dealer, they simply resorted to another.

[32] We note that we cannot be certain of how much of the lump sum damages stated by the jury in answer to question 9 was intended to be allocated to the price-fixing claim. We are not bound by the district court's attribution of $34,200. in damages to the price-fixing claim (see note 20, *supra*). In his testimony Dr. Staelin presented two different estimates of these damages—$34,200. and $90,000. The first figure was obtained by multiplying the $76. differential per car between the formula price and the competitive market price times the number of cars (450) 22 Ford allegedly sold to Hertz and Avis during the relevant period. The second figure is the product of the $76. differential and an estimate of the percentage of fleet sales (5%) that 22 Ford was expected to attain over that period. Although the district court mentioned only the former estimate in its charge, it did not explicitly limit the jury to that figure.

spiracy, with what they would have been in its absence under freely competitive conditions . . ., the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances 'juries are allowed to act upon probable and inferential, as well as direct and positive proof.' *Story Parchment Co. v. Paterson Co., supra*, 561-4; *Eastman Kodak Co. v. Southern Photo Co., supra*, 377-9."

*Bigelow v. RKO Radio Pictures, Inc., supra* at 264.

For the foregoing reasons, the district court judgment of May 27, 1972 (filed May 30, 1972—1564a), as amended by orders of December 26, 1972 (1668a) and January 16, 1973 (1676a), will be vacated and the case will be remanded to the district court for the entry of an order, consistent with this opinion, granting (1) judgment for defendant on the cause of action for violation of the oral contract, and reversing to plaintiff Rea the right to sue for damages at the appropriate time if any, in the future;[33] (2) a new trial on the issue of damages on the cause of action for violation of the Automobile Dealers' Act; (3) judgment for defendant on that part of the cause of action under the Sherman Act concerning Ford's operation of its wholly-owned retail outlets; and (4) a new trial on that part of the cause of action under the Sherman Act concerning the price-fixing agreement between Ford and Hertz and Avis.

TO THE CLERK:

Please file the foregoing opinion.

.....,
*Circuit Judge.*

[33] See page 5A, including notes 5 and 6, above.

**Appendix to Opinion of April 26, 1974 in Rea, *et al.* v. Ford Motor Company (3d Cir. No. 73-1190, at 1670a-1672a)**

SPECIAL VERDICT

In accordance with instructions of the court, the jury hereby finds as follows:

(1) Was there a binding contract between plaintiff, Edward C. Rea, and defendant, Ford Motor Company, whereby Rea would acquire the title to so-called Balison tract of land in Monroeville, Allegheny County, Pennsylvania?

Answer: "Yes".

(2) If your answer to the first question is "yes", what were the terms of the contract?

(a) that Rea was to take title in his own name or in the name of a corporation formed by him and lease the same to defendant, Ford Motor Company, for a term of years with a lease-back from Ford Motor Company to 22 Ford, Inc., Rea's Dealership? (The so-called *direct-lease plan.*)

Answer: "Yes"

(3) Do you find that the defendant, Ford Motor Company, breached its agreement as found by you in your answers to Questions 1 and 2?

Answer: "Yes"

(4) If your answer to Number 3 is "yes", what amount of damages do you award Edward C. Rea for such breach of contract?

Answer: "$29,683.00".

(5) Did the defendant breach its duty to act in good faith in performance or in complying with any of the terms of the franchise or sales agreement between 22 Ford, Inc. and Ford Motor Company as required by the Automobile Dealers Act?

Answer: "Yes"

If your answer is "yes", what amount of damages do you award plaintiff, 22 Ford, Inc., for this breach of duty?

Answer: "$350,000.00."

(6) Did defendant enter into any contract, combination or conspiracy which was in effect during the period since February 11, 1964, and which unreasonably restrained interstate trade or commerce in Ford motor vehicles at the retail level in the area covered by the Pittsburgh Sales Office of Ford Motor Company?

Answer: "Yes"

(7) Did the defendant during the period from February 11, 1964, attempt to monopolize interstate trade or commerce in Ford motor vehicles at the retail level in the area covered by the Pittsburgh Sales Office of Ford Motor Company?

Answer: "Yes".

(8) Did the defendant violate Section 3 of the Clayton Act making it unlawful to make a sale or contract for sale of goods or commodities on condition that the purchaser shall not use or deal in goods and commodities of a competitor, *viz:* Oldsmobile automobiles manufactured by General Motors Corporation where the effect was substantially

to lessen competition or tend to create a monopoly in any line of commerce?

Answer: "No"

(9) If your answer to either 6, 7 or 8 or any of them is "Yes" what damages did plaintiffs sustain by reason of any such violation of the antitrust laws?

Answer: "$1,750,000.00"

(Signed by the Jury.)

May 25, 1972.

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WEIS, *Circuit Judge*, Concurring and Dissenting:

I concur with the well reasoned opinion of the majority, except with respect to the entry of judgment in favor of the defendant on Count I. I would affirm the judgment in favor of Rea in the amount of $29,383.00.

Count I is a claim for damages resulting from the breach of an oral contract for the sale of realty. This phase of the litigation is based solely on Pennsylvania law and is in the federal courts only by reason of pendant jurisdiction.

Pennsylvania follows the general doctrine that the corporation is an entity separate and distinct from its stockholders. "It is only when justice or public policy demands it and when the rights of innocent parties are not prejudiced thereby nor the theory of corporate entity made useless that the court will disregard the corporate identity." *Fedun v. Mike's Cafe, Inc.*, 204 Pa. Super. 356, 362, 363, 204 A. 2d 776 (1964), *aff'd.* 419 Pa. 607, 213, A. 2d 638. None of these exceptions is presented here.

The contract was executed by Rea as an individual. It is he who has the cause of action for the breach as the jury found in answering special interrogatories. Although Rea holds a majority of the stock in 22 Ford Inc., he is not the tenant. It is the corporation which holds the lease from Ford.

The rule for which *Naftzinger v. Roth*, 93 Pa. 443 (1880), is cited has relevancy only to a person in possession. It can be applied to this case only if the legal distinction between Rea and 22 Ford, Inc. is obliterated.

Ford was well aware that Rea did not intend to have the dealership-tenant be the landowner. The defendant was not misled in any fashion, has not shown any fraud, and is not now entitled to claim that the corporate veil should be pierced.

I find no error in the district court's disposition of Count I, and would affirm its judgment in favor of the plaintiff.

**Judgment**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 73-1190

---

EDWARD C. REA and 22 FORD INC., a corporation,

vs.

FORD MOTOR COMPANY, a corporation,
*Appellant.*

---

(D. C. Civil Action No. 67-286.)

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

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Present: VAN DUSEN, HUNTER and WEIS,
*Circuit Judges.*

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed May 30, 1972, as amended by orders of December 26, 1972, and January 16, 1973, be, and the same is hereby vacated and the cause remanded to the district court for the entry of an order, consistent with the opinion

of this Court, granting (1) judgment for defendant on the cause of action for violation of the oral contract, and reserving to plaintiff Rea the right to sue for damages at the appropriate time, if any, in the future; (2) a new trial on the issue of damages on the cause of action for violation of the Automobile Dealers' Act; (3) judgment for defendant on that part of the cause of action under the Sherman Act concerning Ford's operation of its wholly-owned retail outlets; and (4) a new trial on that part of the cause of action under the Sherman Act concerning the price-fixing agreement between Ford and Hertz and Avis.

ATTEST:

M. ELIZABETH FERGUSON
*Chief Deputy Clerk*

April 26, 1974

Supreme Court, U. S.
FILED
JUL 25 1974
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

**October Term**

No. 74-5

EDWARD C. REA and 22 FORD, INC., a corporation,
*Petitioners,*

v.

FORD MOTOR COMPANY, a corporation,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

THOMAS M. KERR,
1353 Shady Avenue,
Pittsburgh, Pennsylvania 15217,

ROBERT E. WAYMAN,
WAYMAN, IRVIN, TRUSHEL & McAULEY,
1624 Frick Building,
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IN THE

# Supreme Court of the United States

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**October Term**

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**No.** .....

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EDWARD C. REA and 22 FORD, INC., a corporation,
*Petitioners,*

v.

FORD MOTOR COMPANY, a corporation,
*Respondent.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

---

Petitioners Edward C. Rea and 22 Ford, Inc., pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Third Circuit entered on April 26, 1974, which reversed a jury verdict and a judgment in favor of petitioners of $1,000,000.00 (which would be automatically trebled by statute[1]) with respect to the Sherman Act portions of the case below, and which set aside the jury's award of damages in the amount of $350,000 under the Automobile Dealers' Day in Court Act.

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[1] 15 U.S.C. §15 (1964).

## Opinions Below

The opinion of the Court of Appeals review of which is sought is as yet unreported and is set forth at pages 98-127 in the Appendix hereto.[2] The earlier opinion in this litigation, also set forth in the Appendix hereto (App. 6-90), the opinion and order of the District Court for the Western District of Pennsylvania, filed December 26, 1972, denying respondent's Motions for Judgment in Accordance with Motions for Directed Verdict with respect to all causes of action submitted to the jury, in the Alternative, a Motion for New Trial, and Motion to Amend the Judgment, is reported at 355 F.Supp. 842 (December 26, 1972, as amended January 30, 1973).

## Jurisdiction

The judgment of the Court of Appeals for the Third Circuit was entered on April 26, 1974. A timely petition for rehearing was filed on May 7, 1974, and denied on May 28, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## Questions Presented

1. Does a plaintiff have a right of trial by civil jury in a treble damage suit under the antitrust laws or in a suit under the Automobile Dealers' Day in Court Act?

2. Is a plaintiff deprived of a right of trial by civil jury if an appellate court, after a jury verdict has been returned in favor of the plaintiff and it has been considered by the trial judge in the light of a motion for judgment notwith-

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[2] Citations to the Appendix to this petition are in the form "App. —a." A certified copy of the Joint Appendix printed for use of the court below has been furnished to the Clerk of this Court, and references to it are in the form, "3rd Cir. App. _____."

standing the verdict and in the alternative for a new trial, reverses the judgment although there are ample facts in the trial record upon the questions which were before the trial jury?

3. Is a plaintiff in private antitrust litigation entitled to damages where the record clearly shows defendant's intent to undertake a course of economic conduct which defendant expects to injure plaintiff's business and the businesses of others, a multiplicity of acts perpetrated to implement that intent and conduct, and where plaintiff's business was located within the local geographic market area endangered by the anti-competitive acts of the defendant?

## Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions involved are set forth in the Appendix hereto beginning at pages 1-5. They include the following:

(1) United States Constitution Amendment VII.

(2) United States Code, Title 15, Sections 1 and 2 (Sherman Act Sections 1 and 2).

(3) United States Code, Title 15, Section 15 (Clayton Act Section 4).

(4) United States Code, Title 15, Sections 1221-1225 (Automobile Dealers' Day in Court Act).

(5) Federal Rule of Civil Procedure 38(a).

## Statement of the Case

The complaint in this matter was filed March 6, 1967. After extensive pretrial proceedings, the case was tried before a six-member jury over a six-week period in April

and May, 1972, with United States District Judge William W. Knox presiding. Prior to the trial the District Court granted defendant's Motion for Summary Judgment on causes of action that sought specific performance of an alleged contract to convey real estate and to establish a lien on the real property involved. At the conclusion of the evidence at trial, the Court directed a verdict for defendant Ford on claims alleged in the complaint under the Robinson Patman Act (15 U.S.C. §§ 13(d) and (e)). Four causes of action remained for the jury's deliberations: A cause of action respecting alleged breach of oral contract to convey real estate (App. 9); a cause of action under the Automobile Dealers' Day in Court Act (15 U.S.C. § 1221, *et seq.*) (App. 9); causes of action under the Sherman Act (15 U.S.C. §§ 1 and 2 (App. 9); and a cause of action respecting alleged violation of Section 3 of the Clayton Act (15 U.S.C. § 14).

Questions for the jury under each of these points were presented to it in a Special Verdict form (App. 91-93).

In response to the court's questions the jury found: (1) that there was a binding oral contract between Rea and Ford for the transfer of real estate, that Ford had breached the contract, and that Rea had thereby been damaged in the amount of $29,683; (2) that defendant Ford had violated the Automobile Dealers' Act and that plaintiff 22 Ford had thereby been damaged in the amount of $350,000; (3) that defendant Ford had engaged in a combination or conspiracy which unreasonably restrained, and had attempted to monopolize, trade in Ford motor vehicles, and that plaintiffs had thereby suffered damage in the amount of $1,750,000; and (4) that Ford had not violated Section 3 of the Clayton Act (App. 93) (3d Cir. App. 1561a-64a).

The trial court judge denied Ford's motions for a directed verdict, or in the alternative, for a new trial except that he held that the damages fixed by the jury on the Sherman Act antitrust claims should be reduced and that a motion for a new trial would be granted unless plaintiffs filed a remittitur for all single damages in excess of $1,000,000 (3d Cir. App. 1590a-1668a). On January 12, 1973, the plaintiffs filed the remittitur and on January 16, 1973, the court below amended its judgment accordingly (3d Cir. App. 1674a, 1676a).

Ford appealed to the Third Circuit.

In its opinion filed April 26, 1974, the United States Court of Appeals for the Third Circuit set aside the District Court's judgment awarding damages to the plaintiff for violation of the oral agreement as being prematurely sought (This part of the opinion of the Circuit Court is not involved in this Petition); concluded that the jury's finding that Ford had violated the Automobile Dealers' Act should be sustained, although holding that its award of damages thereunder should be set aside and remanded for a new trial upon the question of damages alone; reversed, without remand for retrial, the jury's verdict, supported by the opinion of the court below, that Ford's operation of its company-owned outlets caused economic injury to the plaintiffs in violation of the Sherman Act (App. 99); and held upon the second claim of plaintiffs under the Sherman Act that plaintiffs had proved that Ford had conspired with Hertz and Avis to fix the price at which those rental companies would buy new cars from 22 Ford and other dealers (App. 121) and that this "constitutes a restraint of trade in violation of Section 1 of the Sherman Act" (App. 122). However, with respect to the latter claim the Circuit Court ruled that it was unable to tell what portion of the amount assigned by the jury to Sher-

man Act violations was based on this price-fixing claim and how much upon the claim arising out of the operation of company-owned outlets. Therefore, the Circuit Court ordered a new trial based on this Sherman Act price-fixing claim alone (App. 126).

## Reasons for Granting the Writ

The decision of the Court of Appeals does tremendous violence to the concept of the jury system and to the right of trial by jury as declared by the Seventh Amendment to the Constitution. The decision distorts the expression in the Federal Rules of Civil Procedure preserving the right of trial by jury. And the decision discourages antitrust enforcement by private parties. The total disregard of fundamental Seventh Amendment rights in the Court of Appeals decision so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The decision of the Court of Appeals is in conflict with other courts of appeals with respect to its narrow requirement of direct proof of injury (after the Court of Appeals disregarded a plethora of such proof which was before the jury) to the business or property of an antitrust private plaintiff.

### A. Effect of the Verdict of the Jury

When a jury verdict has been returned and it has been considered by the trial judge in the light of a motion for judgment notwithstanding the verdict and in the alternative for a new trial, the scope of appellate review is strictly limited. It then becomes the duty of the appellate court to affirm if all of the evidence together with favorable inferences therefrom reasonably supports the determination of fact made by the jury, and the judgment of the

court rendered thereon. *Tennant v. Peoria & Pekin Union Ry.*, 321 U.S. 29, 35 (1944). *Cf. Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969); *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U.S. 355, 364 (1962).

The Seventh Amendment to the Constitution states:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

The federal courts have maintained a careful vigilance to assure this right against erosion by resolving all doubts in favor of trial by jury as guaranteed by the Seventh Amendment. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959). See also, *Simler v. Conner*, 372 U.S. 221 (1963).

The Federal Rules of Civil Procedure did not change the right to trial by jury. Quite the contrary, Rule 38(a) expressly reaffirmed that constitutional principle, declaring: "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate." *Dairy Queen v. Wood, supra*, at 472.

> "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 477, 486 (1935).

In an unbroken line of cases the Supreme Court has treated the right to a jury trial as a matter too obvious to be doubted. In an action for treble damages under § 7 of the Sherman Act, Mr. Justice Holmes, speaking for a

unanimous Court, considered it plain that "the statute should not be read as attempting to authorize liability to be enforced otherwise than through the verdict of a jury in a court of common law." *Fleitmann v. Welsbach Street Lighting Co.*, 240 U.S. 27, 29 (1916). In a case alleging violation of the Safety Appliance Act of 1910, which did not expressly authorize a private remedy, the Court found an implied right to recover damages in a jury trial "according to a doctrine of the common law." *Texas & Pacific Ry. v. Rigsby*, 241 U.S. 33, 39 (1916). In a case involving an ambiguous claim for damages, either as an amount due under a contract or as a statutory claim for damages for trademark infringement, the Court held that the claim was "wholly legal in its nature however the complaint is construed" and that the "constitutional right to trial by jury" was applicable to the claim. *Dairy Queen, Inc. v. Wood*, *supra*, at 477. And in an action brought under § 4 of the Clayton Act, the Court has expressly characterized the right to a jury trial as "constitutional" in a treble damage suit under the antitrust laws. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510 (1959). "Since the right to a jury trial is a constitutional one, however, while no similar requirement protects trials by the court, that discretion is very narrowly limited and must, wherever possible, be exercised to preserve jury trial." *Id.* at 510.[3]

Entry of judgment upon a jury's special verdict is subject not only to precedential guidelines but to a constitutional restraint as well. The Seventh Amendment requires that if there is a view of the case which makes the jury's answers consistent, the court must adopt that view and

[3] For other expressions that the right to jury trial is important, see *Ross v. Bernhard*, 396 U. S. 531 (1970) and Lumbard, Trial by Jury and Speedy Justice, 28 Wash. & Lee L. Rev. 309, 311-13 (1971).

enter judgment accordingly. *Atlantic & Gulf Stevedores v. Ellerman Lines, supra,* at 364.

In *Atlantic and Gulf Stevedores, Inc., supra,* a longshoreman was injured when a bale of burlap cloth fell on him because the metal bands wrapped about the bales broke while the bales were being hoisted with a hook and winch. The trial court charged the jury that "if you find that the bands of the bale were defective, were inadequate or insufficient * * * then you might find the defendants liable under the doctrine of unseaworthiness." *Id.,* at 361, n.3. The charge became critical in the posture of the case before this Court because the Court of Appeals had reversed the portion of the judgment in favor of the stevedore on the shipowner's claim for indemnity because both had been negligent, in the Court of Appeals' view of the jury's special findings. This Court reinstated the original judgment because "there is a view of the case that makes the jury's answers to special interrogatories consistent," namely, on the matter covered by the *proper* charge on unseaworthiness, and therefore the interrogatories "must be resolved that way * * * [to avoid] a collision with the Seventh Amendment." *Id.* at 364.

In recent decades a number of cases have come to the Court under the Federal Employers' Liability Act. In *Tennant v. Peoria & Pekin Union Ry. Co., supra,* one of the leading cases, the Court granted certiorari "because of important problems as to petitioner's right to a jury determination of the issue of causation." There was no direct evidence of how the decedent was killed. There was evidence that the respondent railroad had been negligent or careless in failing to ring a warning bell before moving an engine, and evidence that the victim was killed by being run over by a train. The question of how the victim met

his death was susceptible to various answers, all somewhat conjectural because of the want of direct evidence, some of which supported petitioner's claims and others respondent's. The Court of Appeals set aside a jury verdict for petitioner for failure of the evidence to make out proximate cause, but this Court reversed:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. *Washington & Georgetown R. Co. v. McDade,* 135 U.S. 554, 571, 572; *Tiller v. Atlantic Coast Line R. Co.,* 318 U.S. 68; *Bailey v. Central Vermont Ry.,* 319 U.S. 350, 353, 354. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. *Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."* 321 U.S., at 35. (Emphasis supplied).

Later Federal Employers' Liability Act cases involving sufficiency of the evidence on causation where several explanations are plausible follow the teaching of the *Tennant* case. In *Schulz v. Pennsylvania R. Co.,* 350 U.S. 523 (1956), a tug fireman was drowned in undetermined circumstances arising from his "work on * * * dark, icy and undermanned boats"; the lower court said: "There is some evidence of negligence, and there is an accidental death.

But there is not a shred of evidence connecting the two." This Court held that there was sufficient evidence of causation to require submission of the case to the jury. *Lavender v. Kurn*, 327 U.S. 645 (1946) was another Federal Employers' Liability Act case in which it was uncertain which of various alternative explanations for the cause of the injury was correct. Petitioner's theory was that a mail-hook protruding from a train had hit the victim, while respondent's theory was that an unknown murderer was responsible. Both theories were plausible; the jury found for petitioner, but the lower Court reversed for insufficient evidence. This court reversed on the ground that the lower appellate court had committed "an undue invasion of the jury's historic function."

These cases all involved the question of whether there was evidence that *any* employer negligence caused the harm, or, more precisely, enough to justify a jury's determination that employer negligence had played any role in producing the harm. In the more recent case, *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500 (1957), one of the questions was whether, given the antecedent negligence or carelessness of the employer in maintaining a roadside surface with loose, slippery gravel instead of a firm, flat footing, the causal impact of such negligentfulness was negatived by the subsequent or concurrent negligence of the employee in failing to pay attention to what he was supposed to be doing. The opinion said:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part * * * in producing the injury * * *. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes * * *. Judicial appraisal of the proofs to deter-

> mine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities." 352 U.S., at 506-507.

The facts before the jury fall within this standard in this case and the Court of Appeals therefore erred in refusing to accept the jury's verdict, violating the Seventh Amendment to the Constitution.

The petit jury in this case was, of course, as usual selected from the public at large. It was not a body subjected to vast publicity; it was not a body which would ever sit again to decide any other matter (and this, of course, is the genius of the jury system). The jury acted responsibly in this case as is apparent on the face of the record. The jury was charged by the court on the morning of May 24, 1972 (3d Cir. App. 1504a-1561a). It deliberated through May 24 and then a full day on May 25, reaching a verdict in the mid-evening on May 25, 1972 (3d Cir. App. 1561a). The responsibility and care shown by the jury in reaching its verdict is indicated finally by the fact that while they responded that the defendant had violated some of the antitrust laws placed before them, they soundly rejected question No. 8 of the special verdict with respect to whether the defendant had violated Section 3 of the Clayton Act (3d Cir. App. 1563a-64a).

The action taken by the Appellate Court in this case has removed participation of the community from the decision-making process which was intended by the Seventh Amendment.

In 1830 Justice Story wrote:

> "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. . . . One of the strongest objections originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the constitution was adopted, this right was secured by the seventh amendment of the constitution proposed by congress; and which received an assent of the people so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people. . . ." *Parsons v. Bedford*, 28 U.S. 433 (1830).

It is essential that such an unconstitutional activity be reversed in order to maintain continued community faith in this participatory process.

Invoking general standards is the community's way of saying that it wants community judgment. The use of general standards in law is an express refusal to be explicit and therefore a denial of the power of the judge to direct a verdict. In *Davis v. Virginian Railway Co.*, 361 U.S. 354 (1960), the Court emphasized the possibility of fair-minded men reaching different conclusions. In cases where there is a possibility of general standards being involved, the Court said the question should be for the jury to decide. In *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107 (1959), Justice Brennan quoted an earlier opinion by Justice Murphy:

> ". . . It is not the function of the Court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. . . . Courts are not

> free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

In *Baker v. Texas and Pacific Railway Co.*, 359 U.S. 227 (1959), the Court again emphasized that the "jury's function is to select from among conflicting inferences and conclusions which it considers most reasonable." In *Schulz, Administratrix v. Pennsylvania Railroad Co., supra*, Justice Black, speaking for the majority of the Court, said:

> ". . . Issues of negligence * * * call for the exercise of common sense and sound judgment under the circumstances of the particular case. '[W]e think these are questions for the jury to determine. . . .' Fact finding does not require mathematical certainty. Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn."

These statements were made in cases involving facts from which many of us would infer no negligence. The Court, however, indicates that it is the function of the jury to make this determination rather than of the courts.

Careful reading of the decision of the Third Circuit Court of Appeals in this case indicates that they have nowhere stated that the District Judge erred or made a mistake as a matter of law, their decision is not upon any question of law.

### (1) *Special Verdict*

It is noteworthy that in this case special verdict procedure was used. This is a procedure which permits the jury to do what it seems to be able to do best—that is, find the facts—and to permit the judge to find and apply the law.

"This device is sensible since it requires the jury to deliberate and find the facts, at the same time allowing them to apply community concepts and community ideas." Charles W. Joiner, Civil Justice and the Jury, Prentice Hall, 1962, p. 85.

(2) *Trial of Facts by a Civil Jury*

Speaking more generally, Charles W. Joiner comments further about the jury in his study:

> "Particularly when we consider the effect of background bias on decision-making does the jury deliberation take on real significance. We all know that lawyers are biased in many matters, some in favor of plaintiffs, some in favor of defendants. This is not to say that lawyers are not objective, but that as an individual each lawyer starts from a hypothesis that is a little different from that with which his neighbor starts. This happens largely as a result of repeated handling of certain typical claims and of constant exposure to problems seen from a single viewpoint. This constant exposure to the typical problems of his clients tends ultimately to bias his thinking to such an extent that the bias is difficult to overcome. When lawyers become judges, the biases which they had as lawyers are carried over. All good lawyers and judges have some background partiality. It cannot be eliminated, for the best lawyers are probably the most partial. We must, however, reduce the effect of this bias in a system of dispute resolution.
>
> "The method of trial by jury which results in a decision based on the deliberation of the jury reduces these preferences and aversions. First of all, the set or bias acquired by the lawyer-judge is not actively carried into the jury room; it does not directly affect jury decisions. Secondly, the jurors are not professionals; they do not hear cases day after day; they do not develop the same kind of set that judges develop from hearing the same kinds of cases, one after another. They are a nonprofessional, nonpermanent group, therefore, they are likely to have much less bias for or

against certain kinds of cases, or persons than does a judge who sees particular kinds of persons or cases in court day after day. Each juror, of course, has individual partialities which have been developed at home or at work, but they are not enhanced by being repeatedly involved in similar cases as are many lawyers and judges. Thus, I think that a jury will tend to approach the problem with less bias than a judge and the deliberative process of decision-making used by the jury will reduce even further that partiality. What remains is likely to be an honest reflection of the community from which the standards of conduct come which are involved in the dispute." pp. 34-35.

• • •

"The average man may well feel that a judge dwelling on the pastoral uplands of the law has lost the common touch, if indeed he ever had it. He will wonder if a judge hewing to the lines established by legal precedent will fully appreciate all the facts in his case.

"His view of a jury is entirely different. He feels that the jury box contains twelve members of his community. He will know that their one desire is to see that justice, as they understand it, shall be done between the two people who have placed themselves unreservedly in their hands. They may be ignorant of the law but in their common wisdom they are fully aware of the dangers and tribulations of ordinary life. They are patient and generous to counsel who appear before them, but they resent bitterly anything which they think is a trick. They will tolerate no subterfuge.

"They will listen for interminable periods to common sense but will become uneasy and restless under a barrage of ill-advised words. They will be annoyed at an ill-timed jest and they will detest the smallest attempt to bully a witness or themselves.

"But as a tribunal for dispensing justice, the centuries have proved them to be without equal." p. 143.

The jury, because it brings to the fact-finding process the collective experience of individuals drawn from the whole spectrum of society, may be better able to resolve

questions of credibility and enunciate community standards of conduct than a single judge or three appellate judges, who at least some perceive to be from the upper stratum of society.

Or, as a novelist has put it:

> "The jury protects the Court. It's a question how long any system of courts could last in a free country if judges found the verdicts. It doesn't matter how wise and experienced the judges may be. Resentment would build up every time the findings didn't go with current notions or prejudices. Pretty soon, half the community would want to lynch the judge. There's no focal point with a jury; the jury is the public itself. That's why a jury can say when a judge couldn't, 'I don't care what the law is, that isn't right and I won't do it.' It's the great prerogative of free men. They have to have a way of saying that and making it stand. They may be wrong, they may refuse to do things they ought to do; but freedom just to be wise and good isn't any freedom. We pay a price for lay participation in the law; but it's a necessary expense."[4]

The Circuit Court of Appeals plainly exceeded its duty by its action in reversing the Sherman Act verdict, supported by the District Judge's decision, in this case. It is not its function to replace the fact-finding responsibility which the Constitution and our legal system have placed solely in the hands and minds of the jury.

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[4] J. Cozzens, The Just and the Unjust, 427-28 (1942); see Curtis, The Trial Judge and the Jury, 5 Vand. L. Rev. 150, 155-56 (1952). See also H. Kalven & H. Zeisel, The American Jury 193-344, 381-410 (1966), for a discussion of jury "legislation" in America.

### B. There was Sufficient Evidence for the Jury

#### (1) *Sherman Act*

In this case the trial jury had before it a plethora of facts, testimony, and documents from which they could well draw their own factual conclusions respecting whether the acts of defendant Ford injured the plaintiff dealer.[5]

The record is replete with such facts as the following:

George Callas, Ford Motor Company Dealer Development executive, enunciated a plan of the Ford Motor Company to place factory stores in major metropolitan marketing areas of the United States ". . . to get dominance in those markets" (3d Cir. App., 539a). In discussing this plan, he said ". . . that the effect *would be to drive the independent dealers out* of the major metropolitan marketing areas . . ." (3d Cir. App., 539a). (Emphasis supplied.)

Moreover, Pittsburgh was one of the 20 major metropolitan marketing areas involved in the plan (3d Cir. App., 539a). This was discussed at a meeting of several Ford executives including the National Sales Manager of the Ford Motor Company, at which the witness, Bernard H. Schroll, was also in attendance. The Ford executives expressed the view, "We don't care about the dealers, we are going to operate the factory stores. If they don't like it, to hell with them" (3d Cir. App., 543a). The same view was expressed at a meeting in New York in 1963 by Mr. L. A. Iacocca, now President of the Ford Motor Company. He ". . . told the meeting bluntly the company intended

[5] In its opinion the Circuit Court itself called this ". . . the *fact* of damages ('injury') . . ." (App. 123). (Emphasis supplied.) ". . . *fact* of injury required to recover treble damages under the Clayton Act."(App. 125). (Emphasis supplied.)

to operate factory stores; if necessary, they were going to get more factory stores; and they were going to acquire dominance in the 20 major marketing areas of the United States, and, if the dealers didn't like it, in effect, 'to hell with you'." (3d Cir. App., 544a).[6] Thus, all the way to the top *management of the company*, Ford itself knew that the policy would cause injury to the business of the independent dealers.

Ford Motor Company was encouraged to incur losses at its wholly-owned company store subsidiaries by Internal Revenue Code and regulation provisions permitting the filing of a consolidated return (3d Cir. App., 492a; 591a).

The prime target of plaintiff's evidence before the jury in this case was a company store, Triangle Ford, located 9.2 miles from plaintiff's independent dealership. Ford owned Triangle in its entirety (3d Cir. App., 377a). Triangle was a wholly-owned subsidiary of Ford from 1961 until its closing in May, 1969 (3d Cir. App., 1105a-06a; 1746a-1748a, Plaintiffs' Exhibit 42; 2133a-2136a, Defendant's Exhibit 292; Defendant's Exhibit 1311; Defendant's Exhibit 178).

Triangle, the dealership wholly owned by Ford Motor Company, spent from twice to three times as much for advertising per new vehicle as independently-financed dealers (3d Cir. App., 389a). Still, representatives of the Ford Motor Company pressured the manager of Triangle to increase the advertising (3d Cir. App., 390a-391a). Representatives of Ford told him they didn't care what it cost or what he spent, just so he moved a large number of autos through his dealership (3d Cir. App., 390a-392a).

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[6] Ford did not call Mr. Iacocca at the trial to refute this. As Judge Knox noted in his opinion below, "This naturally would weigh heavily with the jury." (3d Cir. App., 1626a).

They told him, "I don't care what it costs, sell the cars" and they added, "We don't care what you lose" (3d Cir. App., 392; 442a).

The jury heard evidence in the testimony of the former manager of Triangle Ford, the wholly-owned company store, that Triangle spent two to three times as much for advertising per new vehicle sold as independent dealers (3d Cir. App., 389a). The jury heard the plaintiff, Edward C. Rea, testify that independent dealers could not afford the amount of advertising placed by Triangle (3d Cir. App. 201a).

Since Triangle was losing enormous amounts of money, Schroll was asked how he could continue the advertising, and he answered, ". . . due to the capital contributions and capital loans and so forth, actual payment of these expenses was paid by Ford Motor Company." (3d Cir. App., 436a). Over the extended period of time involved, these totaled more than $1,000,000 (3d Cir. App., 424a).

Factory store losses were replenished by capital contributions, paid-in-surplus contributions, money paid in for excess expenses and excess advertising which was insisted upon by Ford Motor Company executives (3d Cir. App., 576a-578a). Ford made huge monetary advances to Triangle under the guise of capital investments, which Ford knew would never be repaid (3d Cir. App., 1743a, Plaintiffs' Exhibit 39; 1744a, Plaintiffs' Exhibit 40; 1747a, Plaintiffs' Exhibit 43; and 1750a, Plaintiffs' Exhibit 45).

It was stipulated:

> "Mr. Wayman: Members of the jury, on stipulation from the counsel for the Defendant, these figures which I have here marked as plaintiffs' Exhibit No. 221 reflect the losses that have been deducted by Ford Motor Company from their various factory outlets

> here in Pittsburgh. As you can see, the S & L Triangle Motors in 1964 had a deduction of $43,999. In 1965, $84,136. In 1967, $94,722. In 1969, $302,566. In 1970, $89,078 which brings the total up to $614,502 for Triangle Motors, S & L Motors." (3d Cir. App., 339a).

When Triangle was closed in 1969 it was immediately replaced by Liberty Ford at a location directly across the street. Liberty Ford was a "*defacto*" factory store—*i.e.*, Ford agreed to make the operator whole if his business did not succeed (3d Cir. App., 671a)—that lost more than $300,000.00 from June, 1969 until sometime in 1970 (3d Cir. App., 2006a, 2024a, Plaintiffs' Exhibit 230). Such "*defacto*" factory stores, and "dealer development" stores as well, were entirely controlled by Ford since a majority of their Boards of Directors must be and are employees of Ford (3d Cir. App., 656a-657a; 702a). Obviously, any such dealership was equivalent to an owned factory-store subsidiary.

In addition, during the relevant period of time, Ford owned other outlets in the competitive area such as Northland Ford, South Hills Lincoln-Mercury, Gateway Lincoln-Mercury, Crest Lincoln-Mercury, Northway Lincoln-Mercury, and East Hills Ford (3d Cir. App., 2039a, Plaintiff's Exhibit 239). Plaintiff's Exhibit 221 demonstrates local losses in the Pittsburgh area by Ford's company stores exceeded $1,500,000 for the period from 1964 through 1970 (3d Cir. App., 1991a, Plaintiff's Exhibit 221; 339a-340a). This total does not include the losses of Liberty Ford, given above, from June, 1969 until sometime in 1970 of more than $300,000.00 (3d Cir. App., 2006a-2024a, Plaintiff's Exhibit 230).

Further, Triangle Motors' losses were not unique. Ford continued to sustain similar losses in virtually every fac-

tory store it operated in the nation (3d Cir. App., 1907a-1909a, Plaintiff's Exhibits 150, 151).

22 Ford also relied upon the opinion testimony of Dr. Richard Staelin, an Assistant Professor of Marketing at Carnegie-Mellon University, to support its Sherman Act claims. Staelin presented tables showing that Triangle and other selected Ford or Lincoln-Mercury outlets had operated at enormous losses. With respect to this causing injury to the plaintiff, Staelin postulated that while such a policy would increase Ford's manufacturing profits by diverting sales from Ford's competitors, *it would also divert some sales from independent Ford dealers* (3d Cir. App., 865a, 942a-44a). He testified, "Some of the customers [of the factory outlet] come from the franchise dealers." (3d Cir. App., 865a).

The jury observed and heard a witness for the defendant Ford Motor Company, Charles A. Forbes, who worked for the Ford Marketing Corporation of Ford Motor Company, show them a map of the "Pittsburgh Multiple Point Market" prepared by Ford which showed that 22 Ford was only 9.2 miles away from the wholly-owned dealership, Triangle Ford (3d Cir. App., 1289a; 2090a, Defendant's Exhibit 275K). Of course, the jury was drawn from residents of the Western District of Pennsylvania. They are well acquainted with the area. They know that East Liberty, where Triangle was located, is on the eastern edge of the metropolitan area of Pittsburgh and that it is a relatively short distance to the suburb of Monroeville where 22 Ford was located. This was before them to see and understand and it was their common knowledge and experience. The same Ford Motor Company witness, Charles A. Forbes, testified about, ". . .the cross selling effect . . ." between Ford-owned Triangle and 22 Ford (3d Cir. App., 1290a,

1298a-1301a; 3d Cir. App., 2100a, 2101a, Defendant's Exhibit 275U and Defendant's Exhibit 275V). The trial jury heard and observed this witness give his testimony about cross selling between the plaintiff and the defendant's owned outlets. It observed this witness present these documents and this map. Together with their personal knowledge of the geographic area brought by them into the courtroom they were entitled to take this all into consideration in reaching a verdict.

Mr. Forbes said the following in defining cross-selling activities, ". . . cross-selling activities, the percentage of each dealer's sales into the other dealer's areas." (3d Cir. App., 1300a). Defendant's Exhibits 275U and 275V showed that plaintiff 22 Ford had sales into the "primary market area" of Triangle (Liberty Ford) and that Triangle (Liberty Ford) had sales into the primary market area of plaintiff 22 Ford (3d Cir. App., 2100a, 2101a, Defendant's Exhibits 275U and 275V). He said it another way, ". . . In other words, how much of these other dealer market areas would this dealership get, . . ." (3d Cir. App., 1304a). He testified that his marketing studies and exhibits illustrated, ". . . where the dealership would get its business in comparing it to how much business he took out of each of those dealer primary market areas." (3d Cir. App., 1305a). Although Mr. Forbes was presented as a defense witness to demonstrate from his point of view that plaintiff 22 Ford and defendant-owned Triangle (Liberty Ford) serviced generally different market areas with a limited number of overlapping potential customers, the jury heard and observed his testimony and his documents with respect to cross selling between defendant-owned Triangle (Liberty Ford) and plaintiff 22 Ford *and it was entitled to draw its own factual conclusions.*

There was further ample evidence presented to the jury and the trial judge that the operations of Triangle or other Ford affiliated dealerships adversely affected or injured the business or profitability of 22 Ford.

The trial judge, U. S. District Court Judge William W. Knox, said in his Opinion (3d Cir. App., 1659a):

> "In this day of mobility, it is reasonable to expect that customers would travel from one Ford Dealer to another in the Allegheny County area to select a new car, particularly where they might be attracted by massive advertising and aggressive tactics of numerous salesmen. In the light of this, it is vain for defendant to say that plaintiff was not *in the target area* of Triangle Ford. Triangle Ford was not the only company owned store in Allegheny County but there were others and also dealer development stores and in such circumstances under Bigelow and Zenith, plaintiff had to do the best it could in its proof.
>
> "The evidence of Dr. Staelin, plaintiff's expert, as supported by his report (Plaintiffs' Exhibit 241) was that plaintiff, a private dealer, was economically hurt by the fact that the factory stores were subsidized by the defendant in large amounts for advertising promotions and a large number of salesmen." (Emphasis supplied.)

The record before the jury was replete with numerical data proved by testimony and by documents so that they were able to deliberate respecting assessment of damages. While the principal witness respecting damages was Dr. Richard Staelin, other documents and other witnesses furnished much additional information the jury could consider on this subject.

Time after time, Dr. Staelin related the effect of the operation of a highly subsidized factory outlet to competing privately-owned dealers, such as 22 Ford (3d Cir. App. 815a-818a; 2040a, Plaintiffs' Exhibit 240; 832a; 840a; 842a-

843a; 865a) and the direct effect upon 22 Ford (3d Cir. App., 2041a, Plaintiffs' Exhibit 241; 875a-880a).

Ford's records at Triangle indicated that it intended to siphon as much of the fleet business through its factory stores as possible and thereby increase Ford's profit at the factory level, to the detriment of 22 Ford and the other dealers (3d Cir. App., 1741a, Plaintiffs' Exhibit 36).[7]

One exhibit is an analysis of actual retail sales of new Fords, *by geographic U. S. Post Office zip code areas in which Liberty and 22 Ford both found customers in their competition with each other* (3d Cir. App., 1439a-1444a). See also Defendant's Exhibits (3d Cir. App., 2100a, Defendant's Exhibit 275U; 2101a, Defendant's Exhibit 275V).

Dr. Staelin gave an expert opinion upon the extent to which the plaintiff private dealer was economically hurt by the fact that the competing factory store was able to spend more funds for marketing variables such as advertising, promotions, employment of additional sales personnel, and providing other marketing facilities (3d Cir. App., 879a).

Dr. Staelin based his opinions on financial statements which were in the record for many competing dealers in the area (3d Cir. App., 807a; 2039a, Plaintiffs' Exhibit 239). Of course, such statements were available to the jury during their deliberation.

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[7] Also, as a result of an acquisition a few years ago, the Philco Corporation had been merged into the Ford Motor Company. The Ford Pittsburgh District Sales Office obtained the fleet account of the Philco Corporation exclusively for Triangle Motors, its wholly-owned dealer outlet subsidiary (3d Cir. App., 487a-488a). Schrecengost, Ford fleet manager, obtained the Philco fleet business exclusively for Triangle, the factory owned dealer (3d Cir. App., 642a-643a). Compare: *United States v. E. I. duPont de Nemours & Co., et al.*, 353 U.S. 586 (1957); *United States v. Klearflax Linen Looms*, 63 F. Supp. 32 (D. Minn. 1945).

An important part of Dr. Staelin's expert analysis was an inquiry into the average loss per car by company-owned stores in the Pittsburgh area of $125 (3d Cir. App., 831a; 2041a, Plaintiffs' Exhibit 241). He showed by mathematical formulae that Ford, in an effort to maximize its profit, would take into consideration its manufacturer's profit on a car when it left the factory which may have been in the neighborhood of $600.00 (3d Cir. App., 841a; 846a). His marketing computations concluded that it was logical for Ford Motor Company to "subsidize" its factory-owned or controlled stores in Pittsburgh at a rate of about $125 a car, still making $475 on each car in the aggregate (3d Cir. App., 846a). This compared closely to the losses shown by the various documents before the jury. Among these documents were Plaintiffs' Exhibit 241 (3d Cir. App., 2041a) and Plaintiffs' Exhibit 242 (3d Cir. App., 2042a-44a) employed by Dr. Staelin in his computations, but also other documents which were before the jury such as Plaintiffs' Exhibit 239 (3d Cir. App., 2039a).

Plaintiffs' Exhibit 239 is a compilation of all the factory stores in the Pittsburgh District Sales area for those periods in which they were engaged in the retail automobile business from 1964 to the date of the trial. This information was read to the jury by plaintiffs' counsel (3d Cir. App., 806a-807a) and it was likewise available to the jury for their examination during deliberations. It showed average losses per new unit sold fleet and retail by each factory-owned Ford or Lincoln-Mercury outlet in the Pittsburgh District Sales area. The composite total of such losses over the entire period was $121.05 per vehicle (3d Cir. App., 2039a, Plaintiffs' Exhibit 239), almost the same figure which Dr. Staelin theoretically computed.

In his opinion, Judge Knox chose a lesser figure than $600 profit to Ford per car leaving the factory or assembly

plant and he proportionately reduced Dr. Staelin's calculation. Based upon his approach he found ". . . total actual damage for antitrust violations . . ." due to subsidies or discounts received by factory stores in competition with 22 Ford to be $969,247.35 (3d Cir. App., 1662a) and he accordingly held the money verdict for these damages higher than this figure to be excessive (3d Cir. App., 1662a). By remittitur, petitioner accepted the Court's reduction (3d Cir. App., 1674a).

The jury also had available during their deliberation Plaintiffs' Exhibit 221 (3rd Cir. App., 1991a) which reflected the amount of money deducted on Ford Motor Company's Federal Income Tax Returns for the years 1964 through 1970 for its losses due to operating company-owned outlets in the Pittsburgh District Sales area. This exhibit showed losses for Triangle Motors alone for the period as follows:

| | |
|---|---|
| 1964 ..... | $ 43,999.32 |
| 1965 ..... | 84,136.48 |
| 1967 ..... | 94,722.46 |
| 1969 ..... | 302,566.00 |
| 1970 ..... | 89,078.00 |
| TOTAL ..... | $614,502.26 |

And there was available to the jury similar amounts for some of the other factory-owned stores resulting in a total figure to be deducted from its taxes by Ford for such Pittsburgh area owned outlet operations losses of $1,529,216.40 (3d Cir. App., 1991a, Plaintiffs' Exhibit 221). These indeed were facts tried by a jury.

All the above facts directly related to proximate cause of injury to the plaintiff by the defendant were before the jury and the trial judge. Others might assess them differ-

ently than did *the jury or the trial judge. But as* Mr. Justice Douglas wrote in the opinion of this Court in *Atlantic and Gulf Stevedores v. Ellerman Lines, supra,* at 358-59:

> "We might agree with the Court of Appeals had the questions of fact been left to us. But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment said that 'no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.'"

**C. There is conflict between the Circuits respecting requirement of immediate and direct relationship between antitrust defendants, anti-competitive acts and fact of damage to an antitrust private plaintiff's business or property.**

In private antitrust litigation the common legal question of whether the defendant's acts were the proximate cause of the plaintiff's injury has frequently been decided in other Circuits on the basis of the question whether the plaintiff was in the "target area" at which the defendant's acts were aimed. *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358 (9th Cir. 1955); *South Carolina Council of Milk Producers, Inc. v. Newton*, 360 F.2d 414 (5th Cir. 1966); *Perkins v. Standard Oil of Calif.*, 395 U.S. 642 (1969). Congress in the treble damage provision of the Clayton Act, § 4, stated, "*Any person who shall be injured . . .* may sue . . ." 15 U.S.C. § 15 (1964) (Emphasis added).

In *Karseal Corp. v. Richfield Oil Corp., supra,* the test applied was whether the damage claimant "was within the target area of the illegal practices." A supplier frozen out of part of his potential market by a competitor's exclusive-dealing arrangements "was not only hit, but was aimed at" and therefore was allowed to sue. Similar reasoning has been employed in *Elyria-Lorain Broadcasting Co. v. Lorain Journal Co.*, 298 F.2d 356 (6th Cir. 1961), and in

*Productive Inventions Inc. v. Trico Products Corp.*, 224 F. 2d 678 (2d Cir. 1955). "Target area" was the expression for the standard applied earlier in *Conference of Studio Unions v. Loew's, Inc.*, 193 F.2d 51 (9th Cir. 1951), that is, whether the damage claimant is "within that area of the economy which is endangered by a break-down of competitive conditions in a particular industry."

The court in *Sanitary Milk Producers v. Bergjans Farm Dairy, Inc.*, 368 F.2d 679 (8th Cir. 1966) allowed standing to a milk processor whose sales company lost business because of the antitrust violations of a wholesale milk company. The court reasoned that the milk processor and its sales company did not occupy the relationship of raw-material supplier and manufacturer. The processor put out the finished product, and his product moved intact through the sales company, which did no processing or manufacturing. These factors persuaded the court that there was directness of competition between the processor and the wholesaler; that any recovery by the processor would not be in the nature of a windfall; that the processor's injury is something more than remote, is not derivative but direct, and is the proximate result of the wholesaler's misdoing.

In *Schulman v. Burlington Industries, Inc.*, 255 F.Supp. 847 (S.D.N.Y. 1966), the district court was unimpressed by "legal subtleties generated by rules couched in terms of 'direct' versus 'indirect' consequences." The court refused to dismiss an antitrust claim of retailers who were complaining about conduct aimed at their wholesaler-supplier. The retailers alleged that a manufacturer of hosiery conspired with a retail chain to pressure their wholesaler-supplier into purchasing all or substantially all his hosiery requirements from the manufacturer. The complaint further asserted that the manufacturer first induced the other

retail chain to stop buying from the wholesaler and to buy instead directly from the manufacturer. In addition, the retail chain allegedly agreed to and did open retail stores close to the complaining retailers for the purpose of injuring them and bringing further pressure on the wholesaler to deal exclusively with the manufacturer.

To the manufacturer's motion to dismiss, the court replied that the cases make it clear that one qualifies as a private antitrust plaintiff either when the violation is directly aimed at him or when he has been directly harmed by it. The opinion described the conspiracy alleged as one "expressly and purposefully aimed at coercing and injuring the plaintiffs as identified targets." It made no difference to the court that the conspirators were alleged to have combined to produce the restraints hurting the retailers only as part of an over-all scheme to reach bigger game (255 F.Supp. 847, 851).

In this case 22 Ford and other private dealers were clearly known to be and slated to be the "target,"—"We don't care about the dealers, we are going to operate the factory stores. If they don't like it, to hell with them" (3d Cir. App., 543a) and ". . . the company intended to operate factory stores, . . . and, if the dealers didn't like it, in effect, 'To hell with you'" (3d Cir. App., 544a).

In this case below, the District Court Judge noted that ". . . it is vain for defendant to say that plaintiff was not in the target area of Triangle Ford" (3d Cir. App., 1695a).

In this case, the Third Circuit Court of Appeals' opinion enunciated a requirement of direct evidence of effects upon the plaintiff's prices or operating expenses, or direct evidence that plaintiff lost sales or profits (App. 120) to find damage to this private antitrust plaintiff. While there was a plethora of such direct proof for the jury to weigh

which the Court of Appeals ignored (See B. above), this narrow requirement of direct proof of injury is in conflict with the decisions of the Ninth Circuit, *Karseal, supra,* and *Conference of Studio Unions, supra,* the Fifth Circuit, *South Carolina Council of Milk Producers, Inc., supra,* the Sixth Circuit, *Elyria-Lorain Broadcasting, supra,* the Second Circuit. *Productive Inventions, Inc., supra,* and the Eighth Circuit, *Sanitary Milk Producers, supra.*

(2) *Automobile Dealers' Act*

On the question of damages under this claim, again the Court of Appeals substituted itself for the jury and performed a purely jury function. They say:

> "However, the jury's award here failed to reflect *the fact* that in 1964 Rea Olds sold certain of its assets for $60,000 . . ." (App. 114). (Emphasis supplied.)[8]

It is difficult to perceive what the jury's award reflected upon or what the jury reflected upon. All we properly have from the jury is their Special Verdict:

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[8] It is respectfully urged that the Court of Appeals misapprehended recognized, accepted accounting principles and misinterpreted the facts applicable in the matter anyway in remanding for a new trial on this issue of damages solely for the reason that in 1964 Rea Olds ". . . sold certain of its assets for $60,000.00 and that this cash and the remaining assets of the company were thereafter devoted to the operation of the Monroeville Ford franchise." (App. 114).

This transaction took place after the fact of the forced close of business of the Oldsmobile outlet and Dr. Staelin gave these assets no consideration in his computations of Rea Oldsmobile's forecast prospective profits (3d Cir. App., 927a). Dr. Staelin used the figure $54,997 from Rea Oldsmobile financial statements to establish Rea Oldsmobile's operating profit for eight months of 1964. This figure is before closing of the business, before any sale of assets. (3d Cir. App., 927a).

Second, the proof of damages presented to the trial court and jury upon this point related and referred only to the prospective profits of the Oldsmobile franchise after the sale of Rea Oldsmobile if appellee Rea had not been forced to sell it. The shift of assets would have no reflection upon such prospective profits.

> "(5) Did the defendant breach its duty to act in good faith in performance or in complying with any of the terms of the franchise or sales agreement between 22 Ford, Inc. and Ford Motor Company as required by the Automobile Dealers Act?
>
> Answer: 'Yes'."

For their deliberation they had before them Dr. Staelin's expert projections of operating profits for Rea Oldsmobile ranging from lower estimates to a high estimate figure of $690,000 (3d Cir. App., 2042a-2044a; Plaintiffs' Exhibits 242A, 242B, 242C). Again, others might assess what the jury saw and heard differently than did the jury and the trial judge. But this was *a fact tried by a jury* and it may not be reexamined by the Court of Appeals.

**D. The decision discourages antitrust enforcement by private parties.**

In 1971, the then Assistant Attorney General in charge of the Antitrust Division of the U. S. Department of Justice, Richard McLaren,[9] said in an address, ". . . antitrust enforcement is not the province of government alone."[10] In these remarks he was saying what the Supreme Court often said. For instance:

> "Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws." *Minnesota Mining and Manufacturing Company v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965).

Still more recently, in the *Perma Life Mufflers* case, this Court again stated its position that the private treble damage action is a central weapon essential to antitrust enforcement in the United States:

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[9] Mr. McLaren has since been appointed U. S. District Court Judge.

[10] Address by Richard W. McLaren, Assistant Attorney General, Antitrust Division, before the American Bar Association National Institute, New York City, October 21, 1971.

". . . the purposes of the antitrust laws are best served by insuring that the private action *will be an ever present threat* to deter anyone contemplating business behavior in violation of the antitrust laws. . . . the usefulness of *the private action as a bulwark of antitrust enforcement.*" (Emphasis added.) *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968).

Again in 1968, in *Hanover Shoe:*

". . . the congressional purpose that private actions serve 'as a bulwark of antitrust enforcement' and that the antitrust laws fully 'protect the victims of the forbidden practices as well as the public.' *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968); *Radovich v. National Football League*, 352 U.S. 445, 454 (1957). See also *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 329 (1955)." *Hanover Shoe, Inc. v. United Shoe Machinery Corporation*, 392 U.S. 481 (1968).

As in the case of official public antitrust agencies such as the Antitrust Division of the U. S. Department of Justice or the Federal Trade Commission, the attitudes of the federal judiciary can greatly influence the effectiveness of private remedies.

Here is another expression:

"Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. These laws protect the victims of the forbidden practices as well as the public. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.* (1948-1949 Trade Cases, Para. 62251), 334 U.S. 219 (1948). Furthermore, Congress itself has placed the private antitrust litigant in a most favorable position through the enactment of section 5 of the Clayton Act. *Emich Motors Corp. v. General Motors Corp.* (1950-1951 Trade Cases, Para. 62778), 340 U.S. 558 (1951). In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws." *Radovich v. National Football League*, 352 U.S. 445 at p. 454 (1957).

It has been noted, however, that some lower Courts do not share the Supreme Court's endorsement of private antitrust remedies. On this point, Chief Judge Clark of the Second Circuit Court of Appeals has observed:

> "There seems to be a developing trend in some of our trial courts of hostility toward the 'big' antitrust case of discovering obstacles—going even back to matters of pleading remedial relief. Humanly speaking we can well sympathize, for these trials are a burden, if not a bore, to a busy, over-worked court. But we are dealing with settled and cherished congressional policy which is not for us to change or hamper. I suggest that these judicially formed limitations are a definite infringement of legislative policy. However serious the load, I do not believe our able trial judges desire to take any permanent course thus opposed to legislative purposes. But here, while doubtless not contemplated, the course of trial has had that consequence. I think, therefore, it requires and deserves a new start at the trial level." *Eagle Lion Studios v. Loew's*, 248 F.2d 438 at 451. (Dissenting opinion) (C.A. 2d 1957).

Petitioners urge here that the unconstitutional action of the Court of Appeals or the narrow requirement enunciated respecting proof of a private antitrust plaintiff's damages in this case if permitted to stand will constitute serious deterants to private treble damage actions, a discouragement to "private attorneys' general."

Further, to permit the defendant here to succeed will result in "a serious loss in citizenship" by independent entrepreneurs. As Mr. Justice Douglas stated in his dissenting opinion in *Standard Stations:*

> "But beyond all that there is the effect on the community when independents are swallowed up by the trusts and entrepreneurs become employees of absentee owners. Then there is a serious loss in citizenship. Local leadership is diluted. He who was a leader in

the village becomes dependent on outsiders for his action and policy. Clerks responsible to a superior in a distant place take the place of resident proprietors beholden to no one. These are the prices which the nation pays for the almost ceaseless growth in bigness on the part of industry." *Standard Oil of California and Standard Stations, Inc. v. United States*, 337 U.S. 293, 318-19 (1949).

### E. Summary of Reasons

In this case the Circuit Court of Appeals disregarded a plethora of facts of injury to the plaintiff that were before the jury and trial judge and unconstitutionally assumed the role of the jury in reversing the verdict of the jury upon the Sherman Act and Automobile Dealers' Act violations. If this precedent is allowed to stand it will inflict serious damage to sound principles of procedure and antitrust law, an essential part of the Congressional plan for making competition rather than restraints and monopoly the rule of trade.

Under the Seventh Amendment, and Rule 38(a) of the Federal Rules of Civil Procedure, where there was such ample evidence from which the jury could properly conclude the facts of injury to the plaintiff caused by defendant's wrongdoing, that issue should have been left to the jury's determination. Any other ruling would be inconsistent with this Court's decisions in *International Terminal Operating Co., Inc. v. N. V. Nederl. Amerik Stoomv. Maats*, 393 U.S. 74 (1968) and *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, supra.*

Further the Circuit Court of Appeals enunciated a narrow requirement of direct proof of damages by a private antitrust plaintiff which is erroneous, a discouragement to private actions against assaults on free competition, and in direct conflict with decisions of other Circuit Courts of Appeals.

## Conclusion

With respect to the Sherman Act[11] and Automobile Dealers' Act claims, the judgment of the Third Circuit should be reversed and the jury verdict and judgment of the trial judge reinstated, the plaintiffs continuing to be subject to the remittitur they accepted after trial. Further, the case should be remanded for determination by the District Court of petitioners' reasonable attorneys' fees and costs, plus applicable interest, including but not limited to expenditures for services performed in appellate proceedings.

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[11] There were two Sherman Act claims. In its Special Verdict the jury had awarded a single amount for Sherman Act violations (App. 121). (This was amended to a new lower single figure by Remittitur). After it had disallowed one Sherman Act claim (predatory operation of company-owned outlets) but held the other (conspiracy to fix prices with Hertz and Avis) a violation (App. 121) the Court of Appeals felt it was unable to apportion a single trial judgment number of dollars for the allowed second Sherman Act claim and therefore sent that claim back to the District Court for retrial (App. 123). A reversal here upon the first claim, the disallowed claim respecting the predatory operation of company-owned outlets in competition with independent dealers, will resolve the difficulty of apportioning damages between these claims and simply restore the single total verdict judgment amount awarded (after Remittitur) for the Sherman Act violations.

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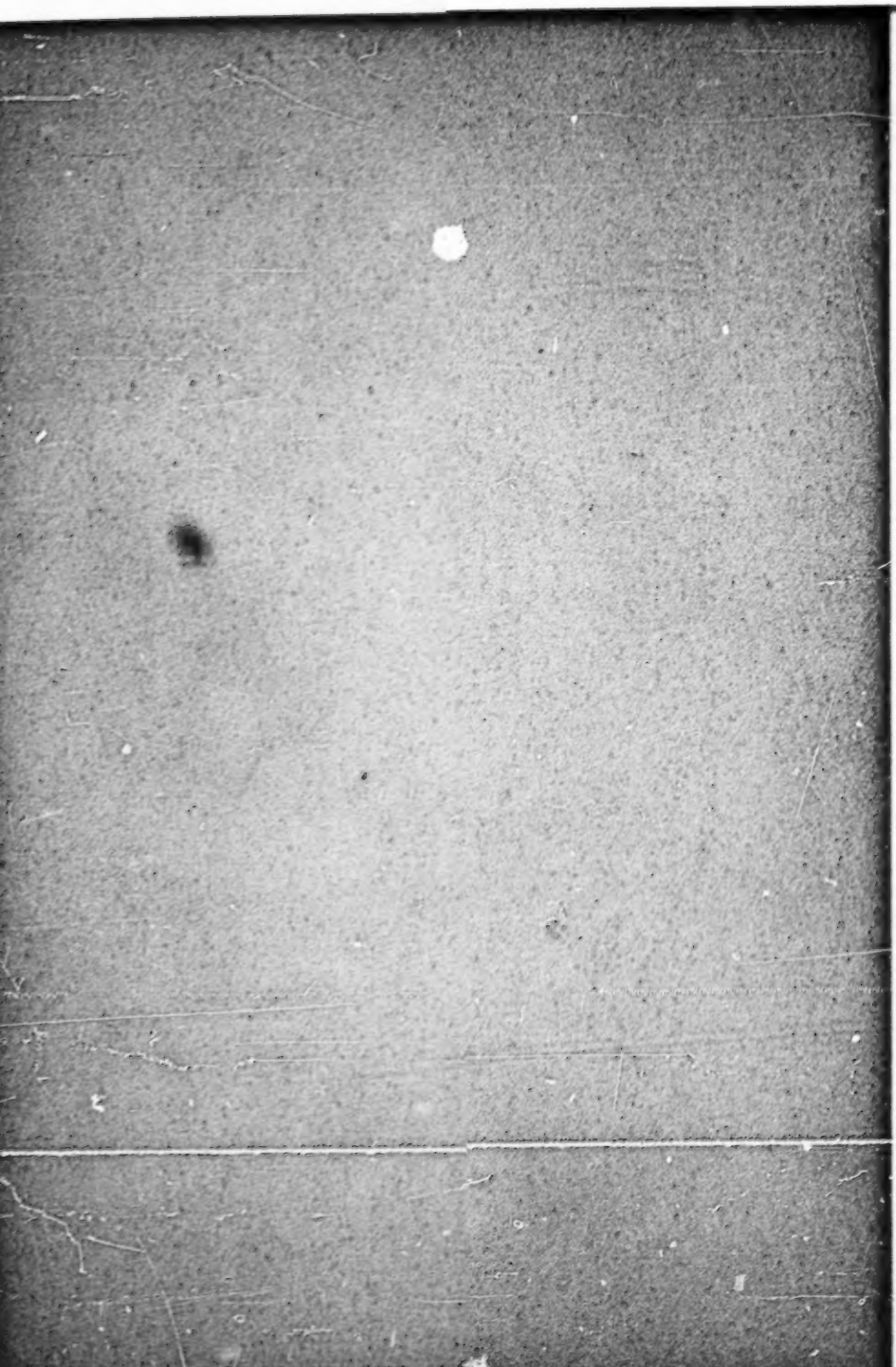

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Nos. 74-5 and 74-12

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

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EDWARD C. REA and 22 FORD, INC., a corporation,
*Petitioners,*

*v.*

FORD MOTOR COMPANY, a corporation,
*Respondent.*

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EDWARD C. REA and 22 FORD, INC., a corporation,
*Petitioners,*

*v.*

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT,
*Respondent.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit, and Motion for Leave to File Petition for Writ of Mandamus**

---

## BRIEF OF RESPONDENT FORD MOTOR COMPANY IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI AND MOTION FOR LEAVE TO FILE

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August, 1974

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## BRIEF OF RESPONDENT FORD MOTOR COMPANY IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI AND MOTION FOR LEAVE TO FILE

### QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that the record in the trial court was so devoid of evidence of any injury to petitioners from operation of company-owned outlets as to warrant judgment for respondent on the cause of action based on such operation.

2. Whether the court of appeals correctly determined on the basis of the record that the damages awarded under the Automobile Dealers Act were in part duplicative and therefore required recomputation.

## STATEMENT

### Proceedings Below

This is a private treble damage antitrust action claiming violations of the Sherman Act (15 U.S.C. §§ 1 and 2) brought against respondent Ford Motor Company. The complaint, filed by a Ford automobile dealership and its proprietor, the petitioners here, included various other contentions under federal and state law, particularly a claim under the Automobile Dealers Act (15 U.S.C. § 1221, *et seq.*).[1]

Petitioners' Sherman Act contentions were, first, that Ford had unlawfully operated company-owned dealerships; and, second, that Ford had illegally agreed on the prices at which Ford dealers were to sell to national car rental companies. The gist of the first claim, concerning the operation of company-owned dealerships, was that from time to time such outlets lost money.

The jury found that Ford had violated the Sherman Act, but its verdict did not reveal whether that ruling was directed at both of petitioners' claims or only the

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[1] The Petition for Writ of Mandamus appended to the Motion for Leave to File in large part duplicates the Petition for a Writ of Certiorari. Hence, observations as to one Petition are applicable to the other. The special issue raised by this attempt to seek Mandamus is treated at pp. 25-26, *infra*. Hereafter, page references to the "Petition" are to the Certiorari Petition. Citations to the appendix to the Petition are in the form "Pet. App. —"; to the joint appendix submitted in the court below, "3d Cir. App. —"; and to the trial transcript, "Tr. —."

first. Damages, before trebling, were set at $1,750,000. The jury also found that Ford had violated the Automobile Dealers Act and that petitioners were entitled to damages in the amount of $350,000.

The district court denied Ford's motion for a judgment *n.o.v.* or, in the alternative, for a new trial, but required petitioners to file a remittitur which reduced Sherman Act damages, before trebling, to $1,000,000.

Upon appeal by Ford, the court of appeals for the third circuit entered a judgment in Ford's favor on one claim—that of Sherman Act liability by reason of Ford's method of operation of its company-owned retail outlets; remanded for a new trial with respect to the Sherman Act price-fixing claim because of the uncertainty of what the jury had decided; upheld the determination that Ford had violated the Automobile Dealers Act; and ordered a new trial on the question of Dealers Act damages because of the presence of duplicative recovery.

Both petitioners and respondent requested a rehearing, but those requests were denied on May 28, 1974.

The Petition for Certiorari is concerned with the court's ruling on the first Sherman Act claim, which was that petitioners had failed to show any injury to their business or property,[2] and with the court's deter-

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[2] Because it determined petitioners failed to make the threshold showing of injury as to the company store claim, the court of appeals did not reach Ford's contentions that Section 1 of the Sherman Act had not been violated, that instructions were erroneous, and that no legally adequate basis for computing damages had been provided. The court of appeals did state that no Section 2 claim was established. (Pet. App. 121, n.28) The Petition does not question this ruling and, accordingly, we do not treat it.

The Petition does not raise any issues respecting the price-fixing claim, and we do not hereafter discuss it. We note, however, that

mination that a retrial was needed as to the question of damages under the Automobile Dealers Act. We describe these issues in more detail.

**Sherman Act Claim**

Petitioners operate a profitable Ford dealership in a suburb of Pittsburgh, Pennsylvania. Their franchise was granted by Ford in 1964, at a time when, according to petitioners' allegations, Ford was supposedly in the midst of a predatory program to destroy all its franchised dealers and replace them with wholly-owned outlets. Except for sales to the United States Government, Ford does not sell directly to ultimate customers; rather, it sells to franchised retail dealers who resell to the public. Ford relies almost exclusively on independently owned retail outlets for distribution of its cars. The record showed without contradiction that at the time of trial approximately 97% of all Ford outlets were independently owned and financed (like petitioners' outlet), and that only a small percentage of the remaining 3% were wholly-owned subsidiaries of Ford. (Pet. App. 99-100) [3]

Petitioners' claim was that Ford was intentionally pursuing a plan to drive its 6000 independently-owned Ford dealers out of business through operation of com-

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the Petition errs in stating (p. 5) that the court of appeals held that petitioners had proved a price-fixing violation. All the court concluded was that the jury *might* properly have inferred from the evidence that an unlawful agreement existed. But whether the jury did or did not is unknown. The court did not hold that such an inference was compelled.

[3] "The remainder were 'dealer development' outlets in which Ford and private parties share the investment, and which are established in the expectation that the private participant will acquire full ownership of the outlet out of his share of its profits." (Pet. App. 99-100)

pany stores at a loss. Petitioners asserted that this plan was nationwide in scope, but their evidence focused primarily on Ford's operation of Triangle Motors, a company-owned Ford dealership in downtown Pittsburgh.

Triangle became a Ford subsidiary in 1961 after its independent operator fell into financial difficulty. (Pet. App. 116) The record is uncontradicted that Ford never created a company-owned outlet and that in every case where company ownership occurred, it was because the independent dealer was in financial distress or had died (3d Cir. App. 1085a-90a, Tr. 3468); and that during the past ten years Ford never had more than 36 company-owned outlets throughout the country at one time, and but thirteen at time of trial. (3d Cir. App. 1097a, 1136a, Pet. App. 99) Consistent with its policy of transferring company-owned stores back to private ownership as promptly as possible (3d Cir. App. 753a, 759a, 1096a-99a), Ford made several efforts to transfer Triangle back to an independent dealer (*e.g.*, 3d Cir. App. 1167a, Tr. 3999, DX 35, 2054a, Tr. 3375) and was ultimately successful.[4]

The Triangle dealership was profitable in four of the eight years following Ford ownership in 1961, but incurred losses, sometimes substantial, in the other years until its closing in May 1969. (Pet. App. 116) Triangle was the only company-owned outlet selling

[4] Triangle was replaced in 1969 by a dealer development store (see note 3), which operated until closed by a lengthy strike in 1970. The Petition (p. 21) surprisingly relies on the $300,000 lost by Triangle's successor, even though the record establishes that a substantial part of those losses were incurred while the dealership was closed by a strike and later during the company's liquidation. (3d Cir. App. 668a-69a, 692a) Losses during periods of non-operation obviously could not adversely affect petitioners.

Ford automobiles in the Pittsburgh area during the relevant period, except for a period of several months when there was one other company store. (Pet. App. 116)[5]

Petitioners presented evidence attempting to show that Ford operated its Triangle outlet purposely at a loss, primarily by causing it to engage in excessive advertising and other sales-promotion activities. A witness testified as to statements claimed to have been made in his presence by various Ford executives which in petitioners' view show that Ford was prompted by an intent to drive independent Ford dealers out of business and to monopolize the retail distribution of Ford cars. (Remarkably enough, one of these supposed statements of destructive intent is said to have been made in a speech by a Ford executive to a meeting of over 1500 independent Ford dealers—his alleged victims. (3d Cir. App. 543a-44a, 574a-75a)) Read plainly, the alleged statements reflect only Ford's desire to compete energetically with other auto manufacturers, using company outlets if needed for adequate distribution coverage. (See Pet. App. 117, n.24)

Petitioners also placed great emphasis on the fact that Ford, as the owner of Triangle, covered the subsidiary's losses with capital contributions and loans and claimed income tax deductions for the losses.[6] And

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[5] Petitioners misleadingly refer to two other "Ford owned . . . outlets" (p. 21) which in fact were company-owned only during brief liquidation periods. (3d Cir. App. 669a-71a, 715a)

[6] While not attempting to note every misstatement in petitioners' brief, we are compelled to challenge their discussion of these loans and capital contributions (p. 20). The total of Ford's capital contributions and loans to Triangle over the years was $1,000,000, but portions of this money were regularly being

petitioners relied heavily on the opinion testimony of an assistant professor of marketing, who concluded on the basis of a theoretical model that it would, under certain circumstances, be to Ford's economic advantage to operate company outlets at a loss when it could thereby divert sales from its competitors such as General Motors and Chrysler. This witness postulated that while such a policy, if pursued, would increase Ford's profits only by diverting sales from competing manufacturers, it would also divert some sales from independent Ford dealers. He did not, however, offer any evidence that the operations of Triangle or other Ford company-owned stores had in fact diverted any sales from independent Ford dealers, or from the petitioners. On the contrary, he admitted he had never studied petitioners' outlet or examined its financial records and expressly took the position that the effect on petitioners' outlet was not relevant to his testimony. See pp. 10-11, 19-20, below.

Petitioners offered no evidence that Triangle or any other company-owned Ford dealership engaged in predatory price-cutting or any similar practices. In fact, the evidence showed that Triangle's prices were in no way abnormal and that Triangle had charged an average of $50 more per car than did petitioners' outlet. (Pet. App. 119) There was no evidence that

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repaid to the parent company. (Pet. App. 116, 3d Cir. App. 548a-53a) At no time did Triangle have outstanding loans to Ford in excess of $300,000, and its capital account never exceeded $317,800. (3d Cir. App. 553a) These figures indicate the inaccuracy of petitioners' statement that "Ford knew [the capital investments] would never be repaid" (p. 20). They indeed were largely repaid. Moreover, in suggesting that large total operating losses were incurred, petitioners aggregate all losses over a seven-year period but ignore the extent to which profitable years served to reduce that aggregate.

the advertising of the company stores was excessive in comparison with that of their immediate competitors (e.g., nearby General Motors and Chrysler dealers). In fact, petitioners' own evidence showed that Triangle's downtown competitors advertised more heavily than did it. (PX 131H, 3d Cir. App. 1837a, Tr. 3200) [7] And data provided by Ford showed that Triangle's advertising was similar to certain area Ford dealers of comparable size. (3d Cir. App. 1316a-20a, 1391a-93a, DX 210, 2079a, Tr. 4308) Petitioners presented no evidence that the advertising of the company stores was designed to lure prospective buyers away from independent Ford outlets; on the contrary, the evidence showed that the company stores were forbidden to advertise themselves as "factory outlets." (3d Cir. App. 1102a, DX 44, DX 193, 2064a, 2073a, Tr. 1775, 3394) Petitioners did not claim, nor could they, that Ford had engaged in coercive refusals to deal, or priced its cars disadvantageously to petitioners, or otherwise restrained independent dealers.[8]

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[7] That evidence was confirmed by data presented by Ford, showing that Triangle's advertising expenditures were less than or comparable to those of Chevrolet, American Motors, and Dodge dealers in the immediate area. (3d Cir. App. 1392a-94a)

[8] We do not attempt here to review in detail Ford's rebuttal evidence on the company-store substantive claim. The thrust of Ford's evidence was that company stores were employed only temporarily and occasionally where an independent Ford dealer fell into financial difficulty, that Ford attempted to turn such stores back to private hands, that company stores were operated in a manner indistinguishable from independent franchised stores, that this policy was applied to Triangle Motors, and that Triangle's occasional losses were due to its poor physical plant, unwise staffing from time to time, decline in the economy of Pittsburgh's inner city, and related factors. Petitioners' "intent" evidence was likewise refuted.

No effort was made by petitioners to show that company-owned stores were making inroads on sales by independent Ford dealers in the relevant geographic market; indeed, the evidence was uncontroverted that Triangle's share of the market remained throughout at a modest 3% to 4%. (DX 204, 3d Cir. App. 2075a, Tr. 4306)

Petitioner Rea admitted during direct examination that he did not know personally of any instance in which a person who had been solicited by his outlet had bought instead from Triangle. (3d Cir. App. 206a-07a) He suggested that such information might lie within the knowledge of sales personnel of his outlet or be disclosed by its records (3d Cir. App. 204a, 206a), but no sales personnel or other employees of the outlet were ever called to testify on this point and the records referred to by the witness were never produced or offered in evidence.

Petitioners did not introduce their financial records into evidence; did not attempt to prove that they had lost any profits or sales or had incurred increased operating costs by reason of any acts of Ford; presented no evidence that their market share had suffered by reason of competition from Ford; and made no effort to demonstrate injury or damages by comparative or statistical methods. The two witnesses presented by petitioners who were presumably in the best position to observe any injury to petitioners' outlet—its president and general manager—had not a word to say about that subject.[9]

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[9] Hence Ford was prevented from cross-examining petitioner Rea, the president of the outlet, on the issue of damages, on the ground that none of his direct testimony dealt with that subject. (Tr. 493-94)

In an effort to satisfy the statutory prerequisite of proving injury to their business and property (15 U.S.C. § 15), petitioners relied on the testimony of their expert witness, the assistant professor of marketing. He asserted that the operating losses incurred from time to time by Ford's wholly-owned outlets, such as Triangle, should be regarded as a "subsidy" paid by Ford to its subsidiaries. The witness, who was not a lawyer, then appeared to assume that the law required that every independent Ford dealer, such as petitioners, be entitled to a like "subsidy" from Ford. (*E.g.*, 3d Cir. App. 877a, 986a) Hence, according to the witness, the failure of Ford to grant to petitioners a sum of money corresponding to losses suffered by Ford's company-owned outlets, *ipso facto* constituted the "injury" to petitioners. And the amount of that injury, the witness argued, should be calculated by computing on a per-car basis a composite "subsidy" figure for Triangle and certain other company outlets, and by multiplying that figure by the number of cars sold by petitioners.

Thus according to this witness' concept of injury and damages, petitioners' "injury" and consequent recovery would increase for every car they succeeded in selling. Had petitioners been twice as successful as they were, instead of $3,000,000 in treble damages they would have been entitled to $6,000,000. (See 3d Cir. App. 986a-87a) And, since no particular impact on petitioners had been shown, this concept of "injury" would presumably be available to support like claims by all other independent dealers.

The testimony of petitioners' expert revealed nothing about the operations of their outlet except the number of cars sold annually—a figure used as a mul-

tiplier in computing "damages." The witness readily admitted that he had never examined the financial records of petitioners' outlet (*e.g.*, 3d Cir. App. 906a), and in his view the operations of that outlet were not "relevant" to his testimony (3d Cir. App. 876a, 906a); he asserted that the operation of petitioners' outlet "has nothing to do with what I am developing" (3d Cir. App. 969a), and that for purposes of his testimony "[w]e don't care what 22 Ford did." (3d Cir. App. 986a)

This view was echoed in a candid admission by petitioners' counsel made during trial, and quoted by the court of appeals:

> "What our position is in the case is what [petitioner] 22 Ford did or did not do is not relevant because we are not asserting in our case that 22 Ford sustained a loss of profits . . . . [W]e haven't put any evidence in the record to indicate any particular loss sustained by 22 Ford." (Pet. App. 120)

In sum, on the basis of a showing that Ford owned a small number of retail outlets, and that some of these outlets, including Triangle, sometimes showed a loss at the end of the year, petitioners asserted an absolute obligation to make payments per car to independent dealers, and sought to transform the absence of such payments into an automatic "injury" for which treble damages were due.

Ford presented considerable evidence to demonstrate that petitioners' dealership was not in fact injured. A detailed market analysis demonstrated that petitioners' outlet and Triangle serviced generally different market areas with a limited number of overlapping

potential customers.[10] And as to those customers, petitioners were as successful as Triangle in obtaining them. Moreover, the "evidence demonstrated that 22 Ford's percentage of sales in [Triangle's marketing] area did not increase after Triangle and its successor went out of business" (Pet. App. 119); the real beneficiaries of the shut-down were Triangle's Chevrolet competitors. Based on this and other evidence, the experts called by Ford concluded that "the operation of Triangle . . . and [its] subsequent closing had no effect at all on the operation of 22 Ford." (3d Cir. App. 1368a) Petitioners presented no contrary evidence. They maintained to the end that whether their outlet had in fact suffered economic injury was not "relevant" to this case.

Despite the absence from the record of any evidence of injury, the jury found in favor of petitioners and fixed damages at $1,750,000. This finding and "damage" computation was necessarily based upon petitioners' "subsidy" theory; no other basis for an award of damages had been presented. And the district court's one million dollar "damage" award on remittitur was expressly computed on the basis of a "subsidy" theory. (Pet. App. 80-84) The district court did not purport to find in the record any evidence that 22 Ford had been actually injured to any extent,[11] let alone to the extent of one million dollars.

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[10] Triangle, in downtown Pittsburgh, and petitioners' 22 Ford, in suburban Monroeville, were 9.2 miles apart, with two other Ford dealers located between them. (3d Cir. App. 1289a)

[11] In denying Ford's post-trial motions, the district court sought to remedy this gap in the record by observing that it was reasonable to expect that some customers might be diverted from one Ford dealer to another in the Allegheny County area. (Pet. App.

On appeal by Ford, the court of appeals determined that the record in the case "provides no rational support for a determination, even by way of inference, that Ford's operation of its company stores caused any injury to the business or property of 22 Ford." (Pet. App. 119) Section 4 of the Clayton Act (15 U.S.C. § 15) authorizes suits only by a person "injured in his business or property." Hence the district court was ordered to enter a judgment for Ford on that part of the Sherman Act claim based upon Ford's operation of its wholly-owned retail outlets.

**Automobile Dealers Act Claim**

Petitioners obtained from the district court an award of $350,000 under the Automobile Dealers Act. In essence, the claim under that Act as it went to the jury was that Ford had in 1964 illegally coerced petitioners into resigning a General Motors franchise in a neighboring town shortly after petitioners were awarded their Ford franchise. They sought damages computed, among other ways, on the basis of a straight-line projection of the future estimated profits of the General Motors franchise from the time of its termination to the time of trial. The jury's award of $350,000 was, as observed by the court of appeals, based on that damage theory. (Pet. App. 114)

While upholding the "close case" on liability (Pet. App. 106), the appellate court ruled that the damages awarded under the Dealers Act were excessive and duplicative. When petitioners resigned their General

79) As stated by the court of appeals, such an observation was "entirely speculative and cannot support the necessary finding that 22 Ford sustained an injury to its business or property as required by Congress for recovery under § 4 of the Clayton Act." (Pet. App. 120)

Motors franchise, they received $60,000 in a sale of certain assets used in that franchise, and that capital was then devoted to operation of the Ford franchise, as were other assets, of an unknown value, which were simply transferred from the old General Motors franchise to the new Ford franchise. Petitioner Rea himself thereafter devoted his time to the Ford rather than the General Motors dealership. But neither the trial court's instructions nor petitioners' damage testimony had taken into account the necessity of adjusting the claimed damages to reflect the fact that the new Ford franchise had been operated with precisely the same capital and assets previously employed in the terminated General Motors franchise. The court of appeals therefore ruled that petitioners were not entitled to an unadjusted recovery, and the issue of damages was remanded for redetermination in light of the court's opinion. (Pet. App. 114-15)

## ARGUMENT

The decision of the court of appeals, which reflects an exhaustive examination of the record in this case, is correct. It applies well established legal principles and is not in conflict with any decision of this Court or any other court. The case presents no constitutional issues. There are no special or important reasons that warrant further review.

### I. No Principle Regarding Appellate Powers Nor Constitutional Issue Regarding the Right To Trial by Jury Is Presented by This Case

Petitioners seek to seize the attention of this Court by suggesting a constitutional issue where none exists. Petitioners claim that the court of appeals exceeded the proper scope of appellate review and violated peti-

tioners' right to a jury trial under the Seventh Amendment.

However, it is clear that the Seventh Amendment does not present an absolute bar to an appellate court's reversal of a jury finding. Numerous decisions of this Court and the lower federal courts confirm that a court of appeals may overturn a jury finding and direct a verdict for the defendant where the plaintiff failed to present sufficient evidence from which the jury could properly have found a critical element in the plaintiff's cause of action.

The court of appeals regarded this as precisely such a case. The Clayton Act authorizes private treble damage suits only by those who have been injured. 15 U.S.C. § 15. The court stated:

> "The record here provides no rational support for a determination, even by way of inference, that Ford's operation of its company stores caused any injury to the business or property of 22 Ford." (Pet. App. 119)

It carefully noted that where a violation of the antitrust laws did cause injury to the business of a competitor of automobile manufacturers "they will be liable for damages." (Pet. App. 121) But after an extensive review of the record in this case and the very arguments petitioners here set forth as indicating the "plethora" of facts indicating injury, the court of appeals concluded that petitioners had failed to present adequate evidence that Ford's operation of its company-owned outlets caused them any economic injury.

The court of appeals did not undertake to weigh conflicting evidence and to draw inferences contrary to adequately based jury findings. Hence the petitioners' extensive citations to cases under the Federal Employ-

ers' Liability Act and the Jones Act (pp. 9-14) are inapposite. There the fact of injury was evident and the controversy was over the extent to which plausible jury findings on causation or neglect or employee status were displaced by a court's own preferred view of the facts. Here, by contrast, the court dealt with a case where petitioners consciously refused to present any evidence of actual injury, and the court, accordingly, ruled that the district court erred in allowing the case to go to the jury.

Where the evidence on a critical issue is insufficient to go to the jury and thus where, as was the case here, the district court erred in denying motions for a directed verdict or for judgment notwithstanding the verdict, it is well established that the Seventh Amendment is no bar to a reversal on appeal. In *Neely* v. *Eby Construction Co.*, 386 U.S. 317 (1967), this Court held that the Seventh Amendment's right to jury trial provides no greater obstacle to the power of an appellate court to enter a judgment n.o.v. than it does to a trial court and "consequently, there is no constitutional bar to an appellate court granting judgment *n.o.v.*" 386 U.S. at 322. This Court went on to state: "Likewise, the statutory grant of appellate jurisdiction to the courts of appeals is certainly broad enough to include the power to direct entry of judgment *n.o.v.* on appeal." *Id.* *See also United States* v. *Generes*, 405 U.S. 93, 106 (1972); *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243, 254 (1940); *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U.S. 654 (1935); 5 *Moore's Federal Practice* ¶ 38.05[5], at 89-90.[12] In short, if the

[12] Similarly, in Galloway v. United States, 319 U.S. 372, 396 (1943), the Court held that the Seventh Amendment does not bar a directed verdict against a plaintiff who withheld critical evidence in his possession that bore on an essential element of his case.

district court erred in its determination that sufficient evidence existed for the case to go to the jury, that is an error of law correctable by the court of appeals.

In essence, therefore, the Petition presents only the question whether the court of appeals erred in its determination that the record in this case presented no adequate evidence on an essential element of petitioners' case.

### II. The Court of Appeals Correctly Determined That the Record Below Was Devoid of Evidence of Injury

The court of appeals correctly stated the governing principle of law (Pet. App. 118):

> "It is well established that a person seeking to recover treble damages under Section 4 of the Clayton Act, 15 U.S.C. § 15, cannot prevail merely by proof that the defendant has violated the antitrust laws. In addition, he must prove that the violation was a material cause of some injury to his business or property."

*See also Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 260-64 (1972), and the decisions from other courts of appeals cited by the third circuit below (Pet. App. 118-19).[13] This prerequisite to a plaintiff's right to treble damages serves to deter uninjured parties from clogging the courts with vexatious, windfall litigation.

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[13] This Court has stated that a treble damage plaintiff's burden of proof on the injury question is greater than that respecting the level of damages. Story Parchment Co. v. Patterson Co., 282 U.S. 555, 562 (1931). *See also* Flintkote Co. v. Lysfjord, 246 F.2d 368, 392 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957). The question of level of burden of proof is not central to the present case, where petitioners did not offer any proof of actual injury.

As described in our Statement, petitioners consciously declined to introduce evidence which bore on the question of injury to their outlet. No financial or profit-and-loss records were offered by them. No one familiar with petitioners' business testified as to any injury. No testimony from customers or potential customers was offered. Mr. Rea could not identify any lost sales. No evidence was presented to show that petitioners were driven out of business, lost profits or sales, incurred additional operating expenses, were forced to cut prices, or were otherwise in any way adversely affected by the acts of Ford. In an excess of caution, Ford as part of its defense introduced considerable evidence to show that petitioners were not injured. Petitioners offered no evidence in rebuttal.

Instead of presenting evidence of injury, petitioners proceeded on a theory which only serves to emphasize their failure of proof of any actual harm. Through use of a mathematical model presented by their expert witness, petitioners attempted to show that in theory Ford's interest would be served by purposefully operating company stores at a deficit in order to divert sales from competing manufacturers. All company-store deficits were described as "subsidies," and it was asserted that petitioners' outlet was, as a matter of law, automatically entitled to receive (trebled) a like "subsidy" per car from Ford. This theory of injury and damages bore no relation to actual injury. The competitive record of petitioners' outlet, its competitive viability, and its financial success were all irrelevant. Proof of lost sales, profits or any other injury in fact was unnecessary. And this theory leads to the peculiar result that the more successful a plaintiff was, the greater his right to damages.

The Petition now attempts to confuse the issue by statements calculated to create the impression that there is evidence in the record that the operations by Ford of its company stores had in fact inflicted injury upon petitioners' business. Petitioners state, for example, that their expert witness "related the effect" of company stores on independent dealers "such as [petitioners'] 22 Ford" and testified as to "the direct effect upon 22 Ford" of the alleged violation (pp. 24-25). But the cited record references contain no evidence whatsoever about actual injury to petitioners' business or property. They contain nothing more than the witness' exposition of his "subsidy" theory of automatic damages, along with an occasional comment that *if* his numerous hypotheses were accepted the operation of company-subsidized outlets might, or may, or would unintentionally divert some sales from franchised Ford dealers. But the witness did not purport to testify as to conditions which in fact existed in Pittsburgh, or that the operation of Triangle or any company outlet had in fact diverted any sales from independent Ford dealers as a group, or from any particular Ford dealer.

Most importantly, the witness did not purport to demonstrate that *petitioners'* outlet had been injured; he in fact admitted total ignorance as to the operations and business of that dealership. (*E.g.*, 3d Cir. App. 906a, 969a, 986a) Indeed, in the portion of the transcript cited by petitioners their expert stated:

> "I have never compared 22 Ford. To me, that is not a relevant argument. The relevant argument is what discount was provided to the factory outlets, and that has nothing to do with comparing it with 22 Ford. The only reason I have to assess

damages, I have to find out how much—how many cars 22 Ford sold." (3d Cir. App. 876a-77a)

Petitioners also make various references to other parts of the record which do not bear on the injury point. The fact of Ford's income tax deductions for deficit operations (p. 27) in no way bears on the question of whether petitioners suffered injuries. Nor is evidence that Triangle lost money in certain years (p. 20) evidence that petitioners lost money. Nor can petitioners' references to Ford's evidence on lack of injury (*e.g.*, the Forbes testimony referred to at page 23) be of assistance to them; that testimony demonstrated that petitioners had not in fact been injured (*e.g.*, 3d Cir. App. 1300a-05a), and petitioners failed to offer any rebuttal.

In most respects petitioners repeat *in haec verba* allegations of so-called evidence of "injury" made to and carefully considered by the court of appeals below. A number of these bear on alleged intent or supposed misconduct but in no respect on the fact of injury. In some instances the allegations are simply misleading. Hence, the petitioners' reference to the availability of the financial statements of "many competing dealers" (p. 25) is disingenuous insofar as it suggests to this Court that the jury may have compared petitioners' performance with that of more profitable independent dealers unaffected by the supposed misconduct. Those financial statements were of certain company stores and the thrust of petitioners' contentions as to these was that they were not profitable. Hence this evidence in no way bears on petitioners' supposed injury.

Further, the portions of the record now referenced by petitioners have no relation to the manner in which

this case was presented to the jury.[14] Petitioners below proceeded exclusively on the abstract and erroneous assumption that the antitrust laws obligated Ford to dole out gifts of capital to its 6,000 independently-financed dealers whenever a company-owned outlet was unsuccessful. This approach was reflected in a jury award of a large sum of "damages" where no injury had been proved. Petitioners deliberately refrained from presenting any actual evidence of injury or damage. This Court has noted that "[t]he production of weak evidence [in an antitrust case] when strong is available can only lead to the conclusion that the strong would have been adverse." *Interstate Circuit, Inc.* v. *United States,* 306 U.S. 208, 226 (1939). *Cf. Galloway* v. *United States,* 319 U.S. 372, 396 (1943).

Evidence of injury is required even where a plaintiff has made out the most egregious and inherently destructive antitrust violation. Here, by contrast, the challenged conduct was not predatory or destructive in any sense previously recognized by the courts. It was not claimed that Ford's company outlets sold cars at discounted prices or that Ford had imposed any competitive constraints on petitioners. Nor was it shown that franchised dealers were individually or as a group being caught in a price squeeze or driven from the marketplace. Essentially all that was proven was that Ford's Triangle outlet competed with its surrounding General Motors, Chrysler, and American Motors dealerships, in some years making a profit and in some years

[14] For example, petitioners refer (p. 25) to two isolated fleet sale arrangements and attempt to suggest these injured 22 Ford. But no effort was made at trial to demonstrate that 22 Ford was denied an opportunity to bid for this business or was in any way injured by these arrangements. Indeed, one of these sales was made *before* 22 Ford was in existence. (3d Cir. App. 190a, 643a)

not. To choose such a situation as the occasion for eviscerating the statutory requirement of some proof of injury as a prerequisite to suit would be bizarre. The court of appeals did not do so and instead correctly ruled, after a thorough consideration of the record, that petitioners had failed to make any showing that their business was harmed.[15]

Petitioners also attempt to argue that the injury question can be resolved by reference to the "target area" doctrine and that the court of appeals decision creates a conflict in this respect. (Pp. 28-31) This argument is frivolous. Roughly speaking, the target area doctrine corresponds to the proximate cause requirement in ordinary tort law. *E.g., Elyria-Lorain Broadcasting Co.* v. *Lorain Journal Co.*, 298 F.2d 356 (6th Cir. 1961); *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F.2d 358 (9th Cir. 1955). It is not a substitute for a showing of injury. On the contrary, it is a limiting doctrine, used to deny recovery to certain plaintiffs even though injured because their injuries were not sufficiently related to the alleged violation.

The determination in this case, however, was that no injury had been shown to exist. The question of the

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[15] The court of appeals ruled that as a matter of law no violation of Section 2 was made out, and this ruling has not been questioned by petitioners. No basis exists for holding that Section 1 of the Sherman Act is violated by operation of a factory-owned store with occasional losses and without predatory pricing, price-cutting, cost-price squeeze, or any other form of coercion of competing independent distributors. Therefore, the decision by the court of appeals is adequately supported on the alternative ground that no violation of the Sherman Act, as properly construed, was shown to exist. A second alternative ground which completely supports the judgment of the court of appeals is that no legally adequate computation of damages was offered.

directness or proximate cause of an injury did not even arise. There is no conflict between the circuits on the necessity of proving injury as a prerequisite to a Clayton Act suit. No court has held that a plaintiff has standing on the antitrust laws if he was "aimed at" by alleged conduct though not in fact "hit." [16]

### III. There Are No Special Issues That Warrant Further Review

It is clear that the gist of petitioners' grievance is that it disagrees with the court of appeals' evaluation of the record below. Yet this was a case in which petitioners pursued the unique course of consciously declining to offer evidence that they were in fact injured by reason of the alleged violation. (The health of petitioners' business was "not relevant" and "we haven't put any evidence in the record to indicate any particular loss . . . ." (Pet. App. 120)) As indicated in the

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[16] In any event, the record in no way suggests that petitioners in particular were the "target" of Ford's company-store operations. The alleged statements by various Ford executives bearing on intent, even if accepted, refer generally to Ford dealers and can rationally be construed only as indicating a desire to compete effectively with other automobile manufacturers through company stores. (See Pet. App. 117, n.24) Petitioners' own expert on motive postulated that company stores were operated in order to obtain sales from competing manufacturers, and that any possible diversion of sales from independent Ford dealers would be unintended and non-beneficial to Ford. (*E.g.*, 3d Cir. App. 832a, 950a-51a) The *amicus* brief on appeal, filed by the Ford Dealers Allance, Inc., in support of petitioners, candidly concedes: "Actually it is highly improbable that it would ever be Ford's objective to put its retail dealers out of business." (P. 4) Indeed, the notion that petitioners might be the "target" of predatory conduct by Ford is belied by the fact that their new and desirable dealership was granted by Ford in 1964, three years after Triangle became company-owned and well after the alleged inception of the destructive conspiracy.

preceding section, the court of appeals correctly evaluated the record below. In any event, the question whether the court erred in this regard is not one that warrants this Court's attention, particularly given the *sui generis* nature of the proceedings here.

Nor is the case for review strengthened by petitioners' claim that the decision below will discourage private antitrust litigants (pp. 32-35). The court of appeals did nothing more than enforce the established rule that such a litigant must establish some injury to his business and property. The true effect of the appellate court's opinion, indeed, is probably the reverse of that forecast by petitioners. Nothing could serve more to discredit the treble damage remedy than massive awards to undamaged plaintiffs. Such discrediting would ultimately result either in Congressional counteraction or in distortion of the rules of substantive liability. The court of appeals has only reaffirmed that federal courts should be free to handle suits by truly aggrieved parties without being encumbered by claimants searching for undeserved rewards.

### IV. No Substantial or Meritorious Claim Is Made Under the Automobile Dealers Act

An appellate court is not precluded from remanding a cause for a new trial on damages where the record is clear that the awarded sum was excessive and duplicative. *See, e.g., Gustafson* v. *General Motors Acceptance Corp.*, 470 F.2d 1057 (8th Cir. 1973); *Albrecht* v. *Herald Co.*, 452 F.2d 124 (8th Cir. 1971), *mandamus denied*, 405 U.S. 1063 (1972). If petitioners are contending merely that the appellate court in this case misconstrued the record as to the duplicative character of the awarded sum, such an issue is hardly worthy

of further review. In any event, given the record below, as reviewed in our Statement, the appellate court's action here was fully warranted. Moreover, the court of appeals correctly observed (Pet. App. 114) that the district court's charge on damages for the claim under the Automobile Dealers Act was defective in not alerting the jury to the danger of duplicative recovery. Where "the error in the charge could not but mislead the jury in reference to a material element necessary for its consideration in determining the amounts of the awards," a new trial is necessary. *United States* v. *River Rouge Improvement Co.*, 269 U.S. 411, 421 (1926). Petitioners will have a full opportunity below to prove any deserved damages.

**V. Petitioners' Alternative Motion for Leave To File a Petition for a Writ of Mandamus Should Be Denied**

Issuance of a writ of mandamus by this Court is an extraordinary act reserved for cases of "public importance and exceptional character." *Ex parte Republic of Peru*, 318 U.S. 578, 586 (1943). *See also Ex parte Fahey*, 332 U.S. 258 (1947); Rule 30, Rules of the Supreme Court of the United States (issuance of the writ "is not a matter of right but of sound discretion sparingly exercised"). It is used to confine a court to lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943). It is not intended to serve as a device to secure reversal of a decision made in the exercise of a lawful jurisdiction, particularly where the decision may be reviewed in regular course. *Ex parte Slater*, 246 U.S. 128, 134 (1918).

The fact that the court of appeals has authority to act is discussed at pp. 14-17, *supra;* and the fact that

petitioners' Petition for Mandamus is virtually identical to their Petition for a Writ of Certiorari is itself a conclusve showing that the Motion is superfluous and should be denicd. Further, as demonstrated in our previous arguments, petitioners have no just complaint with the action of the court below.

## CONCLUSION

The petition in this case raises only a question as to the content of the record below. The court of appeals correctly ruled that petitioners failed to present minimally adequate evidence that operation by Ford of a retail outlet had injured petitioners' franchised Ford outlet in any way.

Petitioners tried this case on the theory that any losses by the Ford-owned outlet constituted a discriminatory "subsidy" and an automatic "injury" to their outlet. They did not attempt to prove that the alleged violation resulted in any lost profits, caused the diversion of any sales, required an increase in expenditures, or otherwise adversely affected their business. While petitioner Rea speculated that his records or employees might be able to demonstrate lost sales, he could not identify even one lost sale and neither the records nor employees were brought forth at trial. Ford's detailed and substantial evidence that petitioners had not in fact been injured went uncontroverted. In light of the record, the appellate court correctly exercised its well-recognized review function, and did not unconstitutionally invade the province of the jury.

Petitioners argue in essence that the court of appeals has misread the record. That argument is incorrect but in any event presents no issue of importance warrant-

ing further review, particularly in view of petitioners' approach to the concept of injury taken at trial.

Petitioners' claim respecting the appellate court's remand of the damage question for the Automobile Dealers Act claim likewise raises simply a dispute as to the content of the record. And the appellate court's unchallenged ruling on the inadequacy of the damage instructions obviously necessitates a new trial.

Petitioners' request for a writ of mandamus is without substance. This case does not present an issue of public importance; the lower court acted within its jurisdiction; and the mandamus request is duplicative of the certiorari petition.

The petition for certiorari and the motion for leave to file a petition for writ of mandamus should be denied.

Respectfully submitted,

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August, 1974